No. 90-7675-CSY
Status: GRANTED

Title: R. A. V., Petitioner
v.
City of St. Paul, Minnesota

Docketed:
April 11, 1991

Court: Supreme Court of Minnesota

Counsel for petitioner: Cleary,Edward

Counsel for respondent: DeCoster,Steven C.

Entry	Date	Note	Proceedings and Orders
1	Apr 11 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	May 10 1991	X	Brief of respondent Minnesota in opposition filed.
3	May 15 1991		DISTRIBUTED. May 30, 1991
5	May 16 1991	G	Motion of Minnesota Civil Liberties Union for leave to file a brief as amicus curiae filed.
7	Jun 3 1991		REDISTRIBUTED. June 6, 1991
8	Jun 10 1991		Motion of Minnesota Civil Liberties Union for leave to file a brief as amicus curiae GRANTED.
10	Jun 10 1991		Petition GRANTED.
			**********
11	Jul 16 1991		Joint appendix filed.
12	Jul 25 1991		Brief amicus curiae of Center for Individual Rights filed.
13	Jul 25 1991		Brief amici curiae of Association of American Publishers, et al. filed.
14	Jul 25 1991		Brief amici curiae of ACLU, et al. filed.
15	Jul 25 1991		Brief amicus curiae of Patriot's Defense Foundation, Inc. filed.
16	Jul 25 1991		Brief of petitioner R. A. V. filed.
17	Aug 22 1991		Record filed.
		*	MN Court of Appeals-one vol.
18	Aug 23 1991		Brief amici curiae of Center for Democratic Renewal, et al. filed.
19	Aug 23 1991		Brief amici curiae of Minnesota, et al. filed.
20	Aug 23 1991		Brief amicus curiae of Criminal Justice Legal Foundation filed.
21	Aug 23 1991		Brief amicus curiae of National Black Women's Health Project filed.
22	Aug 23 1991		Brief amici curiae of NAACP, et al. filed.
23	Aug 23 1991		Brief amicus curiae of Anti-Defamation League of B'Nai B'Rith filed.
24	Aug 23 1991		Brief amicus curiae of Asian American Legal Defense Fund filed.
25	Aug 23 1991		Brief amici curiae of League of Minnesota Cities, et al. filed.
26	Aug 23 1991		Brief of respondent Minnesota filed.
30	Aug 23 1991		Brief amici curiae of National Institute of Municipal Law Officers, et al. filed.
27	Aug 29 1991		Record filed.
		*	Ramsey County Juvenile Court - record (CONFIDENTIAL RECORD)
31	Sep 23 1991		Brief amicus curiae of People for the American Way filed.
28	Sep 24 1991		Reply brief of petitioner In the Matter of R. A. V. filed.

2 pp

No. 90-7675-CSY

Entry	Date	Note	Proceedings and Orders
29	Oct 15 1991		SET FOR ARGUMENT WEDNESDAY, DECEMBER 4, 1991. (1ST CASE)
32	Oct 16 1991		Letter from Counsel for the respondent received and distributed.
33	Oct 24 1991		CIRCULATED.
34	Nov 21 1991	X	Supplemental brief of petitioner In the Matter of R. A. V.(TYPEWRITTEN) filed.
35	Dec 4 1991		ARGUED.

ORIGINAL

90-7675

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN THE MATTER OF THE WELFARE OF

R.A.V.

PETITION FOR A WRIT OF CERTIORARI TO THE

MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

EDWARD J. CLEARY
Counsel of Record
Attorney for Petitioner

409 Midwest Federal Bldg
Saint Paul, MN 55101
(612) 224-3781

MICHAEL F. CROMETT
Of Counsel

1708 American National Bank
Building
Saint Paul, MN 55101
(612) 227-5363

RECEIVED
APR 11 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

9

33 pp

QUESTIONS PRESENTED

1. May a local government enact a content-based, "hate-crime" ordinance prohibiting the display of symbols, including a Nazi swastika or a burning cross, on public or private property, which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender without violating overbreadth and vagueness principles of the First Amendment to the United States Constitution?

2. Can the constitutionality of such a vague and substantially overbroad content-based restraint of expression be saved by a limiting construction, like that used to save the vague and overbroad content-neutral laws, restricting its application to "fighting words" or "imminent lawless action?"

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
TABLE OF AUTHORITIES CITED		iv
I.	OPINION BELOW	1
II.	JURISDICTION	1
III.	CONSTITUTIONAL PROVISION INVOLVED	2
IV.	ORDINANCE INVOLVED	3
V.	STATEMENT OF CASE	3
VI.	REASONS FOR GRANTING THE WRIT:	
	A. WHETHER LOCAL COMMUNITIES MAY ENACT "HATE-CRIME" LAWS, I.E., CONTENT-BASED RESTRICTIONS ON EXPRESSIVE CONDUCT, IS A RECURRING ISSUE OF NATIONWIDE IMPORTANCE WHICH THIS COURT SHOULD DECIDE	6
	B. THIS CASE PROVIDES THE COURT WITH AN OPPORTUNITY TO DELINEATE THE BOUNDARIES BETWEEN EXPRESSIVE CONDUCT PROTECTED UNDER THE FIRST AMENDMENT, AS REFLECTED IN UNITED STATES V. EICHMAN AND TEXAS V. JOHNSON, AND PERMISSIBLE RESTRICTIONS ON SUCH EXPRESSION, AN ISSUE WHICH WILL RECUR UNTIL DECIDED BY THIS COURT	11
	C. THIS CASE PROVIDES THE OPPORTUNITY TO DECIDE THE IMPORTANT AND RECURRING NATIONAL ISSUE OF WHETHER A CONTENT-BASED RESTRICTION ON EXPRESSIVE CONDUCT, WHICH IS SUBSTANTIALLY OVERBROAD AND VAGUE, CAN BE NARROWLY INTERPRETED IN THE SAME MANNER AS A CONTENT-NEUTRAL LAW TO PROHIBIT ONLY EXPRESSIVE CONDUCT WHICH FALLS OUTSIDE OF THE PROTECTION OF THE FIRST AMENDMENT	13

VII. CONCLUSION 17

APPENDIX

A. Opinion of the Minnesota Supreme Court, A 1-5

B. Judgment, B 1

TABLE OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT DECISIONS:

Boos v. Barry, 485 US 312 (1988) 12, 13

Brandenburg v. Ohio, 395 US 444 (1969) 10

Cantwell v. Connecticut, 310 US 296 (1940) 10

City of Houston v. Hill, 482 US 451 (1987) 16, 17

Lewis v. City of New Orleans, 415 US 130 (1973) 5

NAACP v. Button, 317 US 415 (1973) 5

New York v. Ferber, 458 US 747 (1982) 5

Terminiello v. Chicago, 337 US 1 (1949) 10

Texas v. Johnson, 491 US 397 (1989) 4, 6, 11,12, 14

United States v. Eichman, ___US___, 110 SCt 2404 (1990) 4, 11

Ward v. Rock Against Racism, 491 US 781 (1989) 12, 13

Whitney v. California, 274 US 357 (1927) 10

MINNESOTA DECISIONS

In the Matter of the Welfare of R.A.V., 464 N.W. 2d 507 (Minn. 1991) ad passim

In re S.L.J., 263 N.W. 2d 412, 419 (Minn. 1978) 5, 14, 15

OTHER DECISIONS:

Collin v. Smith, 578 F. 2d 1197 (7 Cir. 1978) 10

Knights of Ku Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990) 10

UNITED STATES CONSTITUTION:

Amendment I — ad passim

Amendment XIV — 2

FEDERAL STATUTES:

Title 28, U.S.C. Section 1257 (a) — 2

OTHER STATUTES:

Conn. Gen. Stat. § 46a-58 (1989) — 7

Fla. Stat. §§ 876.17 and 876.18 (1989) — 7

Idaho Code § 17-7902 (1989) — 7

Ia. ALS 2197; 1190 Ia. SF 2197 (1990) — 7

Md. Ann. Code, Art. 27, § 10A — 7

Minn. Stat. § 609.2231 subd. 4 — 7

Minn. Stat. § 609.595 subd. 1a and b, subd. 2, and subd. 3 — 7

Minn. Stat. § 609.605 subd. 3 — 7

Minn. Stat. § 609.713 — 15

Minn. Stat. § 609.72 — 14

Minn. Stat. § 609.746 subd. 3 — 7

Minn. Stat. § 609.79 — 7

Minn. Stat. § 609 795 subd. 2 — 7

O.C. Ga. § 16-11-37(b) (1989) (Georgia) — 7

Mont. Code Anno., § 45-5-221 (1989) — 7

N.C. Gen. Stat. § 14-12.12 — 7

N.J. Stat. §§ 2C:33-10, 2C:33-11 (1987) — 7

REW 9A.36.080 (1989) (Washington State) — 7

Va. Code Ann. § 18.2-423 (1989) — 7

ORDINANCES:

Saint Paul City Ordinance, 292.01 — 7

Saint Paul City Ordinance, 292.02 — ad passim

OTHER SOURCES

Chicago Tribune, March 18, 1991 — 8

New York Times, December 6, 1990 — 8

Saint Paul Pioneer Press, (Associated Press-Detroit), December 29, 1990 — 8

Time Magazine, March 25, 1991 — 8

Time Magazine, April 1, 1991 — 8, 9

PETITION FOR A WRIT OF CERTIORARI TO THE

MINNESOTA SUPREME COURT

Petitioner, R.A.V., a juvenile, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in the above-entitled matter on January 18, 1991.

I.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported as In the Matter of the Welfare of R.A.V., 464 N.W. 2d 507 (Minn. 1991), and is attached as Appendix A to this Petition. A copy of the final judgment appears in Appendix B.

II.

JURISDICTION

On July 16, 1990, the District Court of Ramsey County, Minnesota, held that St. Paul City Ordinance section 292.02 was unconstitutional. The state filed a timely Notice of Appeal and Petition for Accelerated Review by the Minnesota Supreme Court. On August 3, 1990, the Minnesota Supreme Court granted the Petition for Accelerated Review. On January 18, 1991, the

Minnesota Supreme Court reversed the district court order and remanded the case for trial. Final judgment was entered by the court on February 27, 1991.

This Court has jurisdiction to review the judgment of the Minnesota Supreme Court by Writ of Certiorari pursuant to Title 28, U.S.C. Section 1257 (a).

III.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

ORDINANCE INVOLVED

Saint Paul City Ordinance 292.02, Disorderly Conduct:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

V.

STATEMENT OF THE CASE

On June 25, 1990, a petition was filed in Ramsey County District Court, Juvenile Division, alleging that R.A.V. was delinquent because he committed the offenses of gross misdemeanor Assault in the Fourth Degree (bias-motivated) pursuant to state statute and misdemeanor Assault (bias-motivated) pursuant to St. Paul City Ordinance. R.A.V. denied the petition and was held in custody.

On July 5, 1990, the state dismissed the misdemeanor Assault charge and added a charge alleging that petitioner committed the offense of misdemeanor Disorderly Conduct (bias-motivated) in violation of the St. Paul city ordinance.

Petitioner requested a hearing to challenge the constitutionality of this ordinance. Briefs were submitted and the motion was argued before the District Court on July 13, 1990. The court took the motion under advisement. In its brief and at argument, the state conceded that the ordinance proscribed expressive conduct.

On July 16, 1990, the district court held that St. Paul City Ordinance § 292.02 was unconstitutional. The court, citing Texas v. Johnson, 491 U.S. 397 (1989), and United States v. Eichman, ___U.S.___, 110 SCt 2404 (1990), found that the ordinance was content-based, that it failed to serve a compelling state interest, and that it was not narrowly drawn to achieve that end.

The state filed a timely Notice of Appeal, as well as a Petition for Accelerated Review by the Minnesota Supreme Court which was granted on August 3, 1990. Briefs were filed and oral argument was held before the Minnesota Supreme Court on December 4, 1990.

On January 18, 1991, the Minnesota Supreme Court held that the ordinance was not substantially overbroad because it could be narrowly interpreted to prohibit only expressive conduct falling outside the protection of the First Amendment.

Without citing legal authority, the Minnesota Supreme Court stated that the burning of a cross was a symbol of violence and hatred based on "virulent notions of racial supremacy," that it was "deplorable conduct the City of Saint Paul may without question prohibit," and that it was the "responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear." In the Matter of the Welfare of R.A.V., 464 N.W. 2d 507, 508 (Minn. 1991); Appendix A-2.

The Court acknowledged petitioner's right to challenge this ordinance on its face even though his conduct may have been subject to prosecution. The Court noted this exception to the general rules of standing is intended to overcome the "danger of tolerating, in the area of the First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." Id. (citing NAACP v. Button, 371 U.S. 415, 433 (1973)); Appendix A-3.

However, citing three decisions involving content-neutral laws, New York v. Ferber, 458 U.S. 747 (1982), Lewis v. City of New Orleans, 415 U.S. 130 (1973), and In re S.L.J., 263 N.W. 2d 412, 419 (Minn. 1978), the Court concluded that the ordinance could be narrowly construed to reach only unprotected conduct. Id. at 509-10; Appendix A-3, 4.

The Minnesota Supreme Court attempted to distinguish this Court's decision in Texas v. Johnson, supra, by suggesting that the Saint Paul City Ordinance required a showing that "alarm, anger or resentment in others" had been aroused by the display of symbols. Id., at 510; Appendix A-4.

The Court relied on its 1978 decision in In re S.L.J., supra, in which it narrowly construed a statute prohibiting "offensive, obscene, or abusive language or * * * boisterous and noisy conduct tending to arouse alarm, anger, or resentment in others" to refer to only "fighting words." The Court held that limiting Saint Paul City Ordinance § 292.02 to imminent lawless action or "fighting words" allowed it to withstand constitutional challenge. Id.; Appendix A-4.

VI.

REASONS FOR GRANTING THE WRIT

A.

WHETHER LOCAL COMMUNITIES MAY ENACT "HATE-CRIME" LAWS, I.E., CONTENT-BASED RESTRICTIONS ON EXPRESSIVE CONDUCT, IS A RECURRING ISSUE OF NATIONWIDE IMPORTANCE WHICH THIS COURT SHOULD DECIDE

With our country's increased awareness of the damage inflicted by racial, religious, and ethnic slurs, many states and municipalities are enacting criminal statutes and ordinances prohibiting and punishing such conduct.

The State of Minnesota enacted the following "hate-crime" statutes in 1989: assault, Minn. Stat. § 609.2231 subd. 4; criminal damage to property, Minn. Stat. § 609.595 subd. 1a and b, subd. 2, and subd. 3; trespass, Minn. Stat. § 609.605 subd. 3; intrusion on privacy, Minn. Stat. § 609.746 subd. 3; obscene or harassing telephone calls, Minn. Stat. § 609.79; and letter, telegram, or package harassment, Minn. Stat. § 609.795 subd. 2.

The City of Saint Paul enacted the law at issue in this case, Section 292.02, bias-motivated disorderly conduct, in 1989. This ordinance was amended in 1990 to include symbols which arouse anger, alarm or resentment in others on the basis of "gender." In 1989, the City of Saint Paul also enacted Ordinance Section 292.01, bias-motivated assault.

Other states have also enacted "hate-crime" legislation. See Conn. Gen. Stat. § 46a-58 (1989); Fla. Stat. § 876.17 and 876.18 (1989); O.C. Ga. § 16-11-37(b) (1989); Idaho Code § 17-7902 (1989); 1990 Ia. ALS 2197; 1190 IA. SF 2197; Md. Ann. Code, Art. 27, § 10A; Mont. Code Anno., § 45-5-221 (1989); N.J. Stat. § 2C:33-10, 2C:33-11 (1987); N.C. Gen. Stat. § 14-12.12; Va. Code Ann. § 18.2-423 (1989); and REW 9A.36.080 (1989) (Washington State).

Newspaper and magazine articles demonstrate the nationwide effort to legislate racial, ethnic, and religious sensitivity. Media coverage reflects the controversy surrounding the efforts of other states and local communities to prevent expression which may anger or alarm others on the basis of race. See Time Magazine, March 25, 1991 (Duncan, South Carolina prohibiting display of Confederate flag); Saint Paul Pioneer Press, (Associated Press-Detroit), December 29, 1990 (Michigan law prohibiting ethnic intimidation); New York Times, December 6, 1990 (Georgia law prohibiting display of Ku Klux Klan hood).

Even the nation's colleges and universities are experiencing a type of reverse intolerance against unpopular opinion and increasing "intellectual intimidation." The results are unprecedented prohibitions on expressive conduct that jeopardize the First Amendment guarantee of freedom of speech.

> Taboos on fields of inquiry are increasingly accompanied by bans on language. According to a growing number of academic theorists, the First Amendment guarantee of freedom of speech can be legitimately laid aside for worthy reasons. Chief among them is if it interferes with what is billed as a new and nonconstitutional right: the right to avoid having one's feelings hurt, or what Botstein calls a "subjective interpretation of harm." Thus dozens of universities have introduced tough new codes prohibiting speech that leads to, among other things, a "demeaning atmosphere," and some of them have suspended students for using epithets toward blacks,

> homosexuals or other minorities, not only in classrooms but also in dormitories, in intramural sports and even off campus altogether. Time Magazine, April 1, 1991, p.67.

See also Chicago Tribune, (March 18, 1991).[1]

Clearly there has been a nationwide movement towards stifling expressive conduct that the majority finds offensive or demeaning. Thus well-meaning public officials have enacted 'bias-motivated' legislation that attempts to address the legitimate concern our society has regarding displays of intolerance among its citizens. Since such legislation is politically popular as it is aimed at unpopular minorities, it will almost certainly continue to be enacted in the immediate future.

However, displays of racial, ethnic, religious or gender intolerance reflect varied political viewpoints within our pluristic society and are not susceptible to constitutionally valid restrictions.[2]

Consequently, legislation attempting to regulate the expression of unpopular ideas such as racial, ethnic, or

[1] The article also indicates that a bill was recently introduced in the United States Congress to ban speech codes at private colleges.

[2] "The debate transcends traditional conservative-liberal political lines, with civil libertarians, as well as minorities themselves, divided on the issue." Chicago Tribune, March 18, 1991.

religious supremacy has generated significant litigation. See e.g., Brandenburg v. Ohio, 395 U.S. 444, 445 (1969); Terminiello v. Chicago, 337 U.S. 1 (1949); Cantwell v. Connecticut, 310 U.S. 296 (1940); Collin v. Smith, 578 F 2d 1197 (7 Cir. 1978); Knights of Ku Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990).

The decision of the Minnesota Supreme Court in this case purports to be a constitutional analysis of the ordinance on its face. However, the Court focuses on only one symbol, a burning cross, and states that it is "an unmistakable symbol" of, among others, "hatred based on virulent notions of racial supremacy." In the Matter of the Welfare of R.A.V., supra at 508; Appendix A-2. In the footnote following, the Court cites a law review article: "There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups." Id.

While as a society, it may be our responsibility or obligation to confront such "notions," it is a violation of the First Amendment freedom of speech clause to attempt to prohibit the expression of racial or ethnic supremacy.[3] These

[3] As Justice Brandeis stated over a half century ago, " . . . the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927).

"notions" may take the form of a Nazi swastika, a Confederate flag, a white sheet and hood, or a burning cross, all of which may offend many citizens, particularly African-Americans and Jewish Americans. Other symbols which might offend citizens on the basis of creed or gender are likewise prohibited under this sweeping ordinance.

Petitioner's case provides this Court with an opportunity to establish the parameters for the proscription of expressive conduct by local communities. In addition, by reviewing petitioner's case, this Court could outline the parameters of the First Amendment for lower courts as they interpret "hate-crime" legislation and its progeny in the future.

B.

THIS CASE PROVIDES THE COURT WITH THE OPPORTUNITY TO DELINEATE THE BOUNDARIES BETWEEN EXPRESSIVE CONDUCT PROTECTED UNDER THE FIRST AMENDMENT, AS REFLECTED IN UNITED STATES V. EICHMAN AND TEXAS V. JOHNSON, AND PERMISSIBLE RESTRICTIONS ON SUCH EXPRESSION, AN ISSUE WHICH WILL RECUR UNTIL DECIDED BY THIS COURT

In recent years, this Court has been forced repeatedly to review legislation which seeks to prohibit conduct expressing unpopular views but in doing so encroaches upon the First Amendment to the United States Constitution. See United States v. Eichman, ___ U.S.___, 110 SCt 2404 (1990); Texas v. Johnson,

491 U.S. 397 (1989); Ward v. Rock Against Racism, 491 U.S. 781 (1989); Boos v. Barry, 485 U.S. 312 (1988).

Recent opinions of this Court regarding treatment of the United States flag have been used by other courts for guidance in deciding First Amendment issues. These courts have had difficulty in applying those holdings to cases not involving the American flag.

The decision of the state supreme court in this case demonstrates this difficulty. The Minnesota Supreme Court interpreted this Court's decision in Texas v. Johnson, supra, as permitting states to enact laws prohibiting flag burning where a person knows or has reason to know the conduct will arouse anger, alarm, or resentment in others as long as the law is narrowly construed to reach only "fighting words" or "imminent lawless action." In the Matter of the Welfare of R.A.V., supra at 510; Appendix A-4. This was not the holding of Texas v. Johnson, though the state court chose to focus on certain language from that opinion to justify its conclusion.

The state court's decision sends an ominous message to law-makers in the area of "hate-crime" legislation. It suggests to other courts and law-making bodies, that they may prohibit expressive conduct, such as the display of unpopular symbols which others may find objectionable, by classifying such

expressive conduct as "fighting words." This would leave to law enforcement officials the subjective decision of whether or not to prosecute unpopular expressive conduct and to judges and juries the decision of whether or not the conduct constituted "fighting words." It is inconsistent with the First Amendment to permit the majority to decide whether or not unpopular views expressed by an individual constitute "fighting words." For this reason, this Court has found it necessary to distinguish between content-neutral laws and content-based laws, subjecting the latter to be subjected to the most exacting scrutiny. Ward v. Rock Against Racism, 491 U.S. 781, ___, 109 SCt 2746, 2758 n. 6 (1989); Boos v. Barry, 485 U.S. 312, 321 (1988).

This case provides a logical and appropriate setting for this Court to delineate the parameters of its recent flag burning cases and to thus clarify the standards for deciding the constitutionality of "hate-crime" legislation.

C.

THIS CASE PROVIDES THE OPPORTUNITY TO DECIDE THE IMPORTANT AND RECURRING NATIONAL ISSUE OF WHETHER A CONTENT-BASED RESTRICTION ON EXPRESSIVE CONDUCT, WHICH IS SUBSTANTIALLY OVERBROAD AND VAGUE, CAN BE NARROWLY INTERPRETED IN THE SAME MANNER AS A CONTENT-NEUTRAL LAW TO PROHIBIT ONLY EXPRESSIVE CONDUCT WHICH FALLS OUTSIDE OF THE PROTECTION OF THE FIRST AMENDMENT

The Minnesota Supreme Court ignored the significance of the distinguishing feature of the Saint Paul ordinance, that it is a content-based regulation. Instead, the Court chose to interpret this ordinance in the same manner it had interpreted a content-neutral ordinance twelve years earlier. In re S.L.J., 263 N.W. 2d 412 (Minn. 1978). In that case, the Court noted that other states had been allowed to narrowly construe content-neutral statutes involving disorderly conduct and breach of the peace. However, the Court did not cite any authority for narrowly construing content-based laws. In re S.L.J., supra at 419 n.5.

In In re S.L.J., supra, the Minnesota Supreme Court spared the state disorderly conduct statute by a narrow interpretation. Thus, it is already the law in the State of Minnesota that whoever engages in "offensive, obscene, or abusive language or in boisterous and noisy conduct" which constitutes "fighting words" can be prosecuted and found guilty of disorderly conduct. In re S.L.J., supra; Minn. Stat. § 609.72.

Since the state already has a law prohibiting "fighting words" and "imminent lawless action," the state's interest in maintaining order is not implicated in this case. See e.g., Texas v. Johnson, 491 U.S. 397 (1989). Just as Texas did not need a special law to control lawlessness associated with flag

burning, the City of Saint Paul ordinance in question is an unnecessary abridgement of protected expressive conduct under the First Amendment because an existing content-neutral statute satisfies any legitimate concern.[4]

In enacting the ordinance at issue the City of Saint Paul relied on the language, "arouses anger, alarm or resentment in others," which was found to be unconstitutional on its face in In re S.L.J., supra, at 419. This language became the basis for the ordinance. No effort was made to limit or correct the language which had been held to be overbroad and vague in In re S.L.J., supra at 418.

In addition to that language, the City of Saint Paul added two more elements to its "hate-crime" law: (1) "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika," and (2) "on the basis of race, color, creed or religion or gender commits disorderly conduct."

These additional elements indicate clearly that this ordinance is content-based and that, unlike content-neutral laws,

[4] Of course, the only conduct which may legitimately be prohibited under this substantially overbroad and vague ordinance, burning a cross which threatens a crime of violence with the intent to terrorize another, is punishable as a felony offense under the terroristic threats statute. Minn. Stat. § 609.713.

this ordinance cannot be saved from complete invalidation by a narrow interpretation. These distinguishing factors clearly demonstrate that it is the content of the expression which is to be prohibited. City of Houston v. Hill, 482 U.S. 451 (1987).

As this Court has noted, abstention, i.e., allowing a limiting construction of an ordinance when such a construction is readily available, is particularly inappropriate when it involves a First Amendment challenge to a law on its face. City of Houston v. Hill, 482 U.S. 451, 452 (1987). When a substantially overbroad law is plain and unambiguous it is not susceptible to a limiting construction because its literal wording punishes and may deter a significant range of protected expression. City of Houston v. Hill, supra, at 468.

The language of the Saint Paul ordinance is "plain and unambiguous." The ordinance is not susceptible to a limiting construction. This Court must make it clear that the saving construction available in reviewing content-neutral laws is neither applicable nor appropriate to situations involving content-based laws, particularly "hate-crime" legislation. The potential for chilling protected expression is too great to permit such a construction to save "content-based" restrictions on expressive conduct.

As this Court stated in City of Houston v. Hill, supra at 472, "(a) certain amount of expressive disorder not only is inevitable in a society committed to individual freedom but must itself be protected if that freedom would survive."

VII.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court in this matter.

Respectfully submitted,

EDWARD J. CLEARY
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

COUNSEL OF RECORD
ATTORNEY FOR PETITIONER

APPENDIX A. Opinion of the Minnesota Supreme Court, A 1-5

dismissed charge prior to trial on grounds that ordinance censored expressive conduct in violation of First Amendment. City appealed. The Supreme Court, Tomljanovich, J., held that ordinance was not substantially overbroad because it could be narrowly interpreted to prohibit only expressive conduct which falls outside First Amendment protection.

Reversed and remanded.

1. Constitutional Law ⇐90.1(1)
Disorderly Conduct ⇐1

Bias-motivated disorderly conduct ordinance was not substantially overbroad, where ordinance could be narrowly interpreted to prohibit only expressive conduct amounting to fighting words or imminent lawless action falling outside First Amendment protection. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐42.1(3)

Overbreadth doctrine, as exception to standing requirements peculiar to disputes regarding extent to which First Amendment protects speech and other expressive conduct, permits individual to facially challenge provision even though individual engaged in conduct that is itself subject to prosecution. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐82(3)

Overbreadth doctrine is intended to overcome danger of tolerating, in area of First Amendment freedoms, existence of penal statute susceptible of sweeping and improper application. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐82(3)

If challenged provision is substantially overbroad, law may not be enforced against anyone, including party before court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐82(3)

Where overbreadth of challenged law is both real and substantial, and where words of law simply leave no room for narrowing construction, so that in all its applications law creates unnecessary risk of chilling free speech, court will completely invalidate it; when possible, however, court narrowly construes law subject to facial overbreadth attack so as to limit its scope to conduct which falls outside First Amendment protection while clearly prohibiting its application to constitutionally protected expression. U.S.C.A. Const.Amend. 1.

In the Matter of the
WELFARE OF R.A.V.

No. C8-90-1656.

Supreme Court of Minnesota.

Jan. 18, 1991.

Individual was charged with violating city ordinance prohibiting bias-motivated disorderly conduct. The District Court, Ramsey County, Charles A. Flinn, Jr., J.,

Syllabus by the Court

St. Paul, Minn.Leg.Code § 292.02 (1990) prohibiting bias-motivated disorderly conduct is not substantially overbroad because it can be narrowly interpreted to prohibit only expressive conduct that falls outside first amendment protection.

Steven C. DeCoster, Asst. County Atty., St. Paul, for appellant.

Edward J. Cleary, St. Paul, for respondent.

Steven W. Zachary, St. Paul, for NAACP, amicus curiae.

Mark S. Weitz, Timothy R. Meyerson, Lawrence P. Schaefer, Leonard, Street and Deinard, Minneapolis, Jeffrey D. Sineusky, Stephen M. Freeman, Michael A. Sandberg, New York City, amicus curiae, for Anti-Defamation League of B'Nai B'Rith.

Robert J. Alfton, City Atty., and Mitchell Lewis Rothman, Deputy City Atty., Minneapolis, amicus curiae, for City of Minneapolis.

Heard, considered and decided by the court en banc.

TOMLJANOVICH, Justice.

The City of St. Paul alleges that between 1:00 a.m. and 3:00 a.m. on June 21, 1990, R.A.V. participated in burning a cross inside the fenced yard of an African American family's home. In connection with this incident, the City charged R.A.V. with violating St. Paul, Minn.Leg.Code § 292.02 (1990), which provides that

> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. The trial court, however, dismissed the charge prior to trial on the ground that the ordinance censors expressive conduct in violation of the first amendment to the United States Constitution. The City now appeals that decision, contending that the ordinance can be narrowly construed to reach only conduct that falls outside first amendment protection. In order to prevail, the City must demonstrate "clearly and unequivocally, first, that the trial court erred in its judgment and, second, that unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Joon Kyu Kim*, 398 N.W.2d 544, 547 (Minn.1987) (citing *State v. Webber*, 262 N.W.2d 157, 159 (Minn.1977)).

Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

R.A.V. does not dispute that the City may prosecute individuals who engage in such actions as he is alleged to have perpetrated. Rather, he challenges the particular ordinance under which he was charged

1. *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L.Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples of signs—like all signs—that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context.

Id. (footnotes omitted).

on the ground that it is substantially overbroad. In essence, R.A.V. contends that the St. Paul bias-motivated disorderly conduct ordinance potentially censors so many constitutionally protected activities on its face that it must be completely invalidated. We disagree.

[1-4]. The overbreadth doctrine, an exception to standing requirements peculiar to disputes regarding the extent to which the first amendment protects speech and other expressive conduct, permits an individual to facially challenge a provision even though that individual engaged in conduct that is itself subject to prosecution. *See State v. Krawsky*, 426 N.W.2d 875, 876 (Minn.1988); *see also New York v. Ferber*, 458 U.S. 747, 768-69, 102 S.Ct. 3348, 3360-61, 73 L.Ed.2d 1113 (1982). This exception to the general rules of standing is intended to overcome the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); *see also Dombroski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965). Thus,

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985). If the challenged provision is substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Id.* at 503-04, 105 S.Ct. at 2801-02 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

[5] While the overbreadth doctrine is clearly essential to the protection of free expression, the complete invalidation of legislatively adopted laws it permits is "strong medicine" that this court does not hastily prescribe. *See Broadrick v. Oklahoma*, 413 U.S. at 613, 93 S.Ct. at 2916. Where the overbreadth of the challenged law is both "real" and "substantial," *see New York v. Ferber*, 458 U.S. at 770, 102 S.Ct. at 3361, and where "the words of the [law] simply leave no room for a narrowing construction," *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987), "so that in all its applications the [law] creates an unnecessary risk of chilling free speech," *Secretary of State of Md. v. Joseph H. Munson Co.* 467 U.S. 947, 968, 104 S.Ct. 2839, 2853, 81 L.Ed.2d 786 (1984), this court will completely invalidate it. When possible, however, this court narrowly construes a law subject to facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression. *See In re S.L.J.*, 263 N.W.2d 412, 419 (Minn.1978) (disorderly conduct statute limited to "fighting words" to preserve constitutionality); *New York v. Ferber*, 458 U.S. at 769 n. 24, 102 S.Ct. at 3361 n. 24 ("If the invalid reach of the law is cured [by narrow judicial construction], there is no longer reason for proscribing the statute's application to unprotected conduct." *Id.*); *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1973) (invalidating state statute where state supreme court did not narrow construction on previous remand). We conclude that the ordinance in question can be narrowly interpreted to reach only unprotected conduct, thereby sufficiently decreasing the possibility that those who wish to engage in protected expressive conduct will be dissuaded from doing so by the potential of prosecution and sparing that ordinance from the complete invalidation R.A.V. requests.

Although the United States Supreme Court's recent decision in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105

L.Ed.2d 342 (1989) did not directly address an overbreadth challenge,[2] that decision is instructive as to the scope of constitutionally protected expressive conduct. In *Johnson*, the Court held that Texas could not prosecute an individual for burning a United States flag outside Dallas City Hall under the state's "desecration of venerated objects" statute. *See id.* 109 S.Ct. at 2548. The Court noted that the state had *not* alleged that Johnson's conduct actually disturbed the peace or that it threatened to immediately do so. *Id.* at 2541, 2548. Rather, the state contended that *every* flag burning necessarily possessed the potential to disrupt public safety and order, which empowered it to censor all such conduct. *Id.* at 2542. In rejecting this argument, the Court stated that the first amendment does not permit "the Government to *assume* that *every* expression of a provocative idea will incite a riot, but [instead requires] careful consideration of the *actual circumstances* surrounding such expression." *Id.* (emphasis added). Although in prosecuting Johnson, the state made such an impermissible assumption, the Court clearly indicated that its decision reversing Johnson's conviction did not alter or undermine the states' authority to prohibit expressive conduct likely to provoke imminent lawless action, *id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969)), or constituting "fighting words," *id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942))—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. at 769.

Unlike the flag desecration statute at issue in *Texas v. Johnson*, the challenged St. Paul ordinance does not on its face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution. Rather, the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias. In *In re S.L.J.*, 263 N.W.2d 412 (Minn.1978), this court narrowly construed Minn.Stat. § 609.72, subd. 1(3) (1990), which prohibits "offensive, obscene, or abusive language or • • • boisterous and noisy conduct tending reasonably to arouse *alarm, anger, or resentment in others*," (emphasis added) to refer only to "fighting words," *S.L.J.*, 263 N.W.2d at 419, thereby preserving it in the face of an overbreadth attack. Similarly limited to expressive conduct that amounts to "fighting words"—conduct that itself inflicts injury or tends to incite immediate violence, *see Chaplinsky v. New Hampshire*, 315 U.S. at 572, 62 S.Ct. at 769—the ordinance in question withstands constitutional challenge.

St. Paul's bias-motivated disorderly conduct ordinance is also constitutional to the extent it prohibits conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447, 89 S.Ct. at 1829 (footnote omitted). Where the "anger, alarm or resentment" the ordinance speaks of rises to the level of "imminent lawless action," *id.* at 449, 89 S.Ct. at 1830, the City is permitted to intervene and censor the provocative conduct. *See Texas v. Johnson*, 109 S.Ct. at 2542. Because the City's disorderly conduct ordinance is reasonably subject to an interpretation limiting its scope to such conduct as *Brandenburg* places outside first amendment protection, we conclude that it is not substantially overbroad.[3]

2. The Court avoided Johnson's claim that the statute was substantially overbroad by concluding that his particular conduct—burning a flag without threatening public safety or order—was itself protected expression and that his conviction was thus unconstitutional. *See Texas v. Johnson*, 109 S.Ct. at 2538 n. 3.

3. The St. Paul ordinance is significantly different from the provision the United States Supreme Court invalidated in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). That provision banned all "First Amendment activities" from the central terminal area of Los Angeles International Airport. *Id.* at 571, 107 S.Ct. at 2570. The Court concluded the provision could not be preserved because its language "simply [left] no room for a narrowing construction." *Id.* at 575, 107 S.Ct. at 2572. *See also Secretary of State of Md. v. Joseph H. Mun-*

In upholding the challenged ordinance against R.A.V.'s constitutional attack, we do not take lightly the first amendment issues that his attack raises. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 109 S.Ct. at 2544. "Resort to epithets or personal abuse," however, "is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act [raises] no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309–10, 60 S.Ct. 900, 905–06, 84 L.Ed. 1213 (1940). Although the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980), and therefore is not prohibited by the first amendment.

We therefore reverse the trial court's pretrial order declaring the City of St. Paul's bias-motivated disorderly conduct ordinance unconstitutional. Count two of the amended juvenile petition charging R.A.V. with violating that ordinance is reinstated and the case is remanded for trial.

GARDEBRING, J., took no part.

son Co., 467 U.S. at 965–67, 104 S.Ct. at 2851–53 (statute limiting expenses of all charitable fund raising operations not subject to limiting construction); *cf. CSC v. Letter Carriers*, 413 U.S. 548, 580–81, 93 S.Ct. 2880, 2897–98, 37 L.Ed.2d 796 (1973) (invalidation improper where statute "covers a whole range of easily identifiable and constitutionally proscribable * * * conduct").

APPENDIX B. Judgment, B 1

STATE OF MINNESOTA

☒ Supreme Court
☐ Court Of Appeals

In the Matter of the Welfare of
R.A.V.

JUDGMENT

C8-90-1656

Appellate Court Case Number

89D1231

Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the District *Court within and for the County of* Ramsey *of the Court below, herein appealed from, to wit, of the* reversed *be and the same hereby is*

reversed in accordance with the opinion

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT 2-27-91 *Dated* *Attest:* Frederick K. Grittner *Clerk of the Appellate Courts*

By: K. Leidmann *Assistant Clerk*

Form APL-310

DISTRIBUTED
MAY 16 1991

ORIGINAL

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

(3)

No. 90-7675

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN THE MATTER OF THE WELFARE OF

R.A.V.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN C. DeCOSTER
Counsel of Record
Attorney for Respondent State of Minnesota

350 St. Peter Street
Suite 400
St. Paul, MN 55102
(612) 298-5464

18

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED	7
CONCLUSION	11

TABLE OF AUTHORITIES CITED

Page

U.S. CONSTITUTION:

First Amendment to the United States Constitution..... 1,10,11

U.S. SUPREME COURT CASES:

Boos v. Berry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)..... 11

Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942)..... 9

Cohen v. California, 403 U.S. 18, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)..... 9

Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)..... 11

MINNESOTA STATUTES:

Minn. Stat. § 609.2231, Subd. 4..... 5

Minn. Stat. § 609.72, Subd. 1(3)..... 9

MINNESOTA CASES:

City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980)..... 9

City of St. Paul v. Mulnix, 232 N.W.2d 206 (Minn. 1975)..... 9

In Re S.L.J., 263 N.W.2d 412 (Minn. 1978)..... 9

In the Matter of the Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991)..... 6,8

State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973)..... 9

State v. Klimek, 398 N.W.2d 41 (Minn. App. 1986)..... 9

State, City of Minneapolis v. Lynch, 392 N.W.2d 700 (Minn. App. 1986)..... 9

OTHER:

Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L.Rev. 2320, 2365-66 (1989)..... 8

St. Paul City Ordinance § 292.01..... 6

St. Paul City Ordinance § 292.02..... 6

QUESTION PRESENTED

Whether the bias-motivated disorderly conduct ordinance of the City of St. Paul, Minnesota, as authoritatively construed by the Minnesota Supreme Court, was neither vague nor overly broad in violation of petitioner's rights under the First Amendment to the United States Constitution?

Minnesota Supreme Court Held: In the Affirmative

Respondent accepts the petitioner's statement of the following:

I. OPINION BELOW

II. JURISDICTION

III. CONSTITUTIONAL PROVISION INVOLVED

IV. ORDINANCE INVOLVED

STATEMENT OF THE CASE[1]

On June 21, 1990, between the approximate hours of 1:00 and 3:00 a.m., petitioner R.A.V. was with a group of five other young white males at 291 Earl Street in St. Paul, Minnesota. The group of six comprised two groups of close friends.

Three of the first group had earlier been at the home of one of them. Then they went to the home of the fourth member to smoke marijuana. At this time, it is likely that the four did smoke marijuana and they might also have taken L.S.D.

Understandably, the versions of the members of the two groups varied with each other's as they tried to place blame on others than themselves for the acts that followed.

A fifth member of the first group arrived and the group began to travel at the direction of the latest arrival who purported to know where they could find more marijuana.

At the first house where they stopped, no one was home, and the group collectively decided to go to Mounds Park. On the way they stopped by 291 Earl Street where two of the group spoke with those in the house through the window. Then the group entered the house.

291 Earl is the residence of Arthur Miller, II. Petitioner R.A.V. was then staying at Mr. Miller's house and doing some

---

1. Since there has been no trial of these charges, respondent has attempted to state the facts based on the police reports and statements in the prosecutor's file that have been made available to the defense. Where there is conflict among the witnesses, it is noted.

painting for him. At the time, Miller's son, co-defendant Arthur Miller, III, and petitioner were in the home alone. Miller and petitioner had had some alcohol to drink.

Two members of the first group knew Miller and petitioner; the other three did not know them well, if at all. One member of the first group left early on, the four members and Miller and petitioner remaining at 291 Earl.

As to the events that followed, there is conflict among the statements. Two facts are clear. All six young men were present throughout and Miller and petitioner were the central instigators and enthusiastic supporters of the cross-burning.

There was some discussion of causing some "skinhead trouble" and of burning some niggers.

Petitioner went about the house to find the necessary materials. Petitioner and Miller set about the making of the cross. They used approximately two-feet long dowels from the legs of a broken chair they taped together to form a cross, which they then wrapped in terrycloth wraps obtained from petitioner's painting project. A propane tank was taped onto the horizontal member of the cross. Next to it was a Kleen Strip shellac thinner can containing a small amount of flammable fluid.

Once it was completed, the six young men took the cross and a can of paint thinner across the street to 290 Earl in order to plant it in the lawn and light it. It is not clear what words led to the conviction that 290 Earl was to be the place, but it

is certain that they knew the residents were black, and it is certain that petitioner and Miller were not pleased with having "niggers" in their neighborhood.

The group of six went through the fence and onto the lawn of 290 Earl, and the petitioner, co-defendant Miller, and possibly one of the others were involved in placing the cross, dousing it with paint thinner and lighting it. After the cross ignited, the group ran back to 291 Earl to hide. When the police came, the boys stayed inside as they began their production of the second and third crosses. Again, it seems apparent that the petitioner and Miller were the main instigators.

The complainant, a black male who resides at 290 Earl Street, said he heard voices in his yard and when he went to look out the window, he saw a large flame burning in his yard. Though he saw no one, the complainant heard at least two voices. He was concerned because his was the only black family living in the neighborhood. He said he didn't know who could have done this.

Though the complainant and his five children, who ranged in age from six months to nine years, had experienced other acts of vandalism and name-calling over the preceding several months, there was no evidence these six young men had been involved in any of them.

After the officers had left, the second cross was placed on the boulevard across the street from 290 Earl. Miller and petitioner were involved in the placing and lighting of it. It

is not clear whether all six of the young men were present when it was lighted.

When it was burning, the group made its way to an apartment complex at 995 McLean. There they lit a third cross in the parking lot on the northwest corner of Earl and Suburban Avenue. There are several black families in this complex.

The group then ran back to 291 Earl where they remained briefly before Miller told them to leave before his father came home. Petitioner stayed on in the Miller home as he had before.

The group, other than petitioner and Miller, claimed to be more interested in getting and staying very "high" from marijuana than in participating in the cross burnings. They claimed they stayed at 291 Earl for fear of being implicated due to their short hair if they left and were seen.

Petitioner admitted--indeed in one instance, bragged about --his involvement in the cross burning to two separate witnesses on the following day.

Pieces of a chair were found and seized at 291 Earl that matched the charred dowels formed into the cross found at the scene of the offense.

Four days after, on June 25, 1990, respondent State of Minnesota filed in the Juvenile Court for Ramsey County, Minnesota a petition charging petitioner R.A.V., in two counts, with violation of Minn. Stat. § 609.2231, Subd. 4 (assault in the

fourth degree) and St. Paul City Ordinance § 292.01 (bias-motivated assault).

On July 5, 1990, Count II was amended to charge bias-motivated disorderly conduct under St. Paul City Ordinance § 292.02 which provides as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Juvenile Court, The Honorable Charles A. Flinn, Jr., on July 16, 1990 by order dismissed Count II, which order was by the State appealed to the Minnesota Court of Appeals. The Minnesota Supreme Court on August 3, 1990 granted direct accelerated review and by its opinion filed January 18, 1991 reversed the Juvenile Court, reinstated Count II of the petition and remanded the cause for trial on both counts. The opinion is reported at 464 N.W.2d 507 (Minn. 1991).

Petitioner R.A.V. seeks certiorari from that decision.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The acts alleged in the Count of the Juvenile Court petition here at issue involve six young white males, most of whom had been using some form of alcohol or controlled substance, who decided, between 1:00 and 3:00 a.m. on June 21, 1990, to manufacture a cross from chair dowels wrapped with paint rags, to take it into the fenced yard of the only Black family living in the neighborhood, and plant it in the yard and ignite it with paint thinner.

The Black male who headed the family in the house heard voices in his yard, went to the window, saw the burning cross stuck in his yard and called police.

Later, after police left, the same youths made, placed and burned two more crosses on the boulevard across the street from the Black family's house and in the parking lot of a nearby apartment complex.

Needless to say, there was no demonstration or meeting, apart from the acts of the six youths, then and there taking place. From the placement of the first cross on the lawn and within the fence line, it was self-evident who the cross was burned for, and to whose attention it was directed.

Moreover, at least two of the youths talked while within the yard, in a manner that got the attention of the resident inside, who came to the window where he promptly was made aware of the implicit threat conveyed by the burning cross. At 1:00 to 3:00

a.m., the perpetrators can be fairly sure that the targeted family is at home. In the dark a burning cross can readily be seen.

The Minnesota Supreme Court, at the outset of the opinion recognized the right, indeed the necessity, that society let victims and perpetrators know this is unacceptable behavior.

> Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

1 See Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L.Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples of signs--like all signs--that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context. Id. (footnotes omitted).

In the Matter of the Welfare of R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

The Court went on to state that "R.A.V. does not dispute that the City may prosecute individuals who engage in such actions as he is alleged to have perpetrated," but claims the ordinance is substantially overbroad; that it potentially

censored so much constitutionally protected activities on its face that it must be completely invalidated. The Minnesota Court disagreed, and in so doing authoritatively construed the ordinance as one limited to "fighting words" in order to preserve its constitutionality. Nor is this a recent construction. The Court noted that at least as early[2] as the holding in In Re S.L.J., 263 N.W.2d 412 (Minn. 1978) identical, or like, language had been limited to "fighting words" as defined in Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942): "Those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

As limited to fighting words, the language of the ordinance is neither vague nor overbroad.

It is axiomatic that this Court must accept the authoritative interpretation of the St. Paul City Ordinance by the Minnesota Supreme Court.

In Cohen v. California, 403 U.S. 18, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284, 293 (1971) the defendant wore a jacket on which the words "Fuck the Draft" were plainly visible, the message clearly directed not to another person but to advancing

---

2. Other like cases include: City of Little Falls v. Witucki, 295 N.W.2d 243, 245 (Minn. 1980); City of St. Paul v. Mulnix, 232 N.W.2d 206 (Minn. 1975); State, City of Minneapolis v. Lynch, 392 N.W.2d 700 (Minn. App. 1986); See State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973) (unlawful assembly statute upheld); State v. Klimek, 398 N.W.2d 41 (Minn. App. 1986) (Minn. Stat. § 609.72, Subd. 1(3) disorderly conduct statute upheld).

an abstract, impersonal idea. This Court held that ". . . the constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."

In the case of fighting words, however, counter-argument is irrelevant, even impossible, for the words are uttered in a context where the only available responses are "fight or flight;" to abandon the neighborhood and move away or to retaliate.

Since at least two of the perpetrators of the instant cross burning spoke in the victim's yard in a manner that could be heard within, it can be inferred they wanted immediately to convey their threatening message.

Although the victim chose to call police rather than go outside to confront and retaliate against the culprits, he might have done otherwise. It is the reaction the perpetrator seeks rather than the one the victim chooses that is relevant.

When symbolic conduct is designed solely to threaten, terrorize or injure others, it is not protected by the First Amendment.

Based on its historical and cultural subtext, the burning of a cross under circumstances where it is aimed against one or a group of victims is such a threat. It is a question for the trier of fact to determine whether the actor intended that message to be conveyed to the victims; in this case, the fact finder certainly could--and necessarily would--so find.

The distinction between expressive conduct that is, and is not, afforded First Amendment protection is aptly made in this Court's decision in Boos v. Berry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

There this Court held that a federal statute prohibiting picketing within 500 feet of a foreign embassy was unconstitutional as violative of the First Amendment. However, in so holding, the Court indicated its approval of another federal statute which prohibited willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official in the performance of his duties." 485 U.S. at 324-25, 99 L.Ed.2d at 347.

Pretty clearly, flag burning and the ideas expressed thereby lie on the protected side of the line, Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), while the burning of a cross to intimidate and coerce does not.

CONCLUSION

In summary, certain types of expression are not entitled to constitutional protection; statutes should be narrowly construed to preserve their constitutionality; the legislature has a legitimate and paramount concern in limiting symbolic acts that constitute fighting words, which are threatening to those to whom directed.

Since the Juvenile Court loses all jurisdiction to require R.A.V.'s participation in a rehabilitative program when he turns

nineteen on March 13, 1992, respondent requests as prompt a disposition of this petition as may be feasible under the Court's procedures.

Respondent State of Minnesota prays the Court deny the petition for writ of certiorari filed herein.

Respectfully submitted,

Steven C. DeCoster

By: STEVEN C. DeCOSTER
Assistant Ramsey County Attorney
Counsel of Record
for Respondent State of Minnesota
350 St. Peter Street, Suite 400
St. Paul, Minnesota 55102
Telephone: (612) 298-5464

Dated: May 7, 1991

OFFICE OF THE COUNTY ATTORNEY
RAMSEY COUNTY
SUITE 400
350 ST. PETER STREET
ST. PAUL, MINNESOTA 55102

TOM FOLEY
COUNTY ATTORNEY

TELEPHONE (612) 298-4421
FAX 298-5316
& 292-7827

May 9, 1991

Joseph F. Spaniol, Jr.
Clerk of the United States Supreme Court
One 1st Street N.E.
Washington, DC 20543

RE: In the Matter of the Welfare of R.A.V.
Supreme Court File No. 90-7675

Dear Mr. Spaniol:

Enclosed for filing please find our Brief in Opposition to Petition for Writ of Certiorari in the above entitled matter.

Sincerely,

Steven C. DeCoster

Steven C. DeCoster
Assistant County Attorney

SCD/vad

Enc.

STATE OF MINNESOTA)
)
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Victoria A. Dahlquist, being first duly sworn, deposes and says that on May 10, 1991 she served the attached Brief in Opposition to Petition for Writ of Certiorari in the above entitled matter by placing a true and correct copy thereof in an envelope addressed as follows and depositing the same, with postage prepaid, in the United States Mails at St. Paul, Minnesota:

Mr. Edward J. Cleary
Attorney at Law
409 Midwest Federal Building
St. Paul, MN 55101

Mr. Paul R. Kempainen
Special Assistant Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Victoria A. Dahlquist

Subscribed and sworn to before me
this 10th day of May, 1991.

Notary Public

CYNTHIA R NYGAARD
NOTARY PUBLIC—MINNESOTA
ANOKA COUNTY
My Comm. Expires Oct. 21 1992

90-7675

No. _____

In the

Supreme Court of the United States

October Term 1990

In the Matter of the Welfare of R. A. V.

On Appeal from the
Supreme Court of Minnesota

==========

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF
THE MINNESOTA CIVIL LIBERTIES UNION
RESPECTING PETITION FOR CERTIORARI

==========

Mark R. Anfinson
Attorney for Amicus Curiae
Minnesota Civil Liberties Union
Lake Calhoun Professional Bldg.
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

Of Counsel:
Deborah Gilman
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-3894

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

IN THE MATTER OF THE WELFARE OF R. A. V.

ON APPEAL FROM THE SUPREME COURT OF
MINNESOTA

MOTION OF THE
MINNESOTA CIVIL LIBERTIES UNION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
RESPECTING PETITION FOR CERTIORARI

Movant is a non-profit and non-partisan organization dedicated to the protection and preservation of civil liberties. It concentrates particularly on civil liberties issues in Minnesota. The written consent of the Petitioner, R. A. V., has been obtained and filed with the clerk of this Court. The consent of the Respondent has been requested and

refused.

Movant seeks to submit a brief amicus curiae because it shares with Petitioner a vital interest in the outcome of this proceeding. The St. Paul city ordinance at issue and the decision of the Minnesota Supreme Court interpreting it threaten to have severe repercussions on freedom of expression in Minnesota.

Movant requests this Court to grant leave to file its accompanying brief amicus curiae to present its views to this Court urging modification or reversal of the opinion of the court below.

Respectfully submitted,

Mark R. Anfinson
Attorney for Amicus Curiae
Minnesota Civil Liberties Union
Lake Calhoun Professional Bldg.
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

Of Counsel:
Deborah Gilman
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-3894

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Interest of Amicus Curiae	1
Introduction	2
Argument	6
Conclusion	19
Appendix: Letter of Petitioner granting leave to file brief amicus curiae	A-1

TABLE OF AUTHORITIES

CASES

Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 12

Brandenburg v. Ohio, 395 U.S. 444 (1969) 7, 10, 16

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 6

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 11

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 7, 10, 16

Gooding v. Wilson, 405 U.S. 518 (1972) 11

Houston v. Hill, 482 U.S. 451 (1987) 10, 12, 13

In the Matter of the Welfare of R. A. V., 464 N.W.2d 507 (Minn. 1991) 6, [illegible], 15, 16

Miller v. California, 413 U.S. 15 (1973) 17

NAACP v. Button, 371 U.S. 415 (1973) 11

Papachristou v. Jacksonville, 405 U.S. 156 (1972) 18

TABLE OF AUTHORITIES,
continued

Secretary of State of Maryland
v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 12, 13

Smith v. Goguen,
415 U.S. 566 (1974) 18

Thornhill v. Alabama,
310 U.S. 88 (1940) 10

NO. _____
SUPREME COURT OF THE UNITED STATES
October Term 1990

In the Matter of the Welfare of R. A. V.

On appeal from the
Supreme Court of Minnesota

Brief Amicus Curiae of the
Minnesota Civil Liberties Union
Respecting Petition for Certiorari

INTEREST OF THE AMICUS CURIAE

The Minnesota Civil Liberties Union (MCLU) is a private, non-profit, non-partisan, membership-supported organization having more than 6,000 members in the state of Minnesota. The MCLU is a state-wide affiliate of the American Civil Liberties Union. Its purpose is the protection of the rights and liberties preserved by the Minnesota and

United States constitutions. Among these liberties are the freedom of speech and of the press, and the MCLU has been active in defense of these freedoms against laws limiting the flow of information that the First Amendment was enacted to secure.

INTRODUCTION

The effort of minorities and other protected groups to become full and equal participants in American society continues to be a major catalyst of social change and controversy. The ferment this produces requires constant response by units of government at every level.

In the past few years, a major facet of this response has involved the attempt to address so-called hate crimes. Throughout the country, laws and regulations have been enacted that seek to

deter and punish such behavior. This in turn has led to intense debate about the proper limits of these regulations (including the now ubiquitous controversies over "political correctness," and methods of enforcing it). The enactment by the St. Paul City Council of the ordinance at issue in this proceeding is a reflection of this process, and the ordinance is characteristic of many similar initiatives.

Though the motivation behind the ordinance may have been laudable, it incorporated virtually no sensitivity to its possible effect on freedom of expression. Petitioner R. A. V. therefore asked that it be invalidated as facially overbroad. The trial court agreed with Petitioner, but the Minnesota Supreme Court did not. As a result, this case

presents a clear failure by the Minnesota Court properly to apply decisions of this Court designed to protect free expression.

Compounding this failure is the fact that the Minnesota Court's decision was quite plainly influenced by its own views about the content of the speech at issue. The purportedly narrowing construction of the St. Paul ordinance that the Court adopted in reality does nothing to protect free expression. It does, however, reward and encourage the disregard for the First Amendment exhibited by the St. Paul City Council when it enacted the ordinance. Thus, if allowed to stand, the decision will inevitably lead to more improper enactments, with the consequent hazard they pose to free expression.

It is the position of Amicus that

behavior of the type allegedly engaged in by Petitioner is repugnant, degrading, and appropriately subject to zealous prosecution. Amicus and its affiliated organizations invest enormous effort in seeking to eradicate such behavior. But the particular ordinance employed to charge R. A. V. is hopelessly flawed, and threatens much constitutionally protected activity. It is therefore important to emphasize that it is only the ordinance that is at issue in this proceeding, not the alleged behavior of Petitioner. As this Court has held many times, the end rarely justifies the means when it comes to rights sheltered by the Constitution.

Especially since this case presents issues of widespread currency and importance, Amicus urges the Court to accept jurisdiction.

The Petition herein provides a sufficient factual and procedural background. To avoid redundancy, Amicus will therefore proceed directly to the discussion of the legal issues.

ARGUMENT

The Minnesota Supreme Court rejected Petitioner's request to invalidate the St. Paul ordinance as facially overbroad on the grounds that invalidation would be excessively "strong medicine." Matter of Welfare of R. A. V., 464 N.W.2d 507, 509 (Minn. 1991), citing Broadrick v. Oklahoma, 413 U.S. 601 (1973). Instead, the Court concluded that the ordinance could be "narrowly interpreted to reach only unprotected conduct." Id. With this construction, the Court preserved the ordinance. The Court found two forms of conduct to be unprotected yet within

the reach of the ordinance, (1) "expressive conduct that amounts to 'fighting words,'" citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and (2) "conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action'" citing Brandenburg v. Ohio, 395 U.S. 444 (1969), 464 N.W.2d at 509.

This Court has held repeatedly that where an enactment is substantially overbroad, and where its primary effect is to restrict expression, the appropriate remedy is invalidation. The St. Paul ordinance meets both criteria. It is in fact an understatement to say that as drafted, the ordinance is substantially overbroad. Furthermore, virtually all forms of behavior penalized by the ordinance are expressive behavior. It is

not acts of trespass, disorderly conduct, or damage to property that are addressed, but only pure speech, whether by means of a "symbol, object, appellation," or in the form of words ("graffiti" and "characterization"). And since the gravamen of the offense created is that the expression might arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender," it is obviously the content of the expression that is targeted.

Thus framed, the reach of the ordinance is truly extraordinary. The ordinance potentially applies if anyone is angered, alarmed, or resentful about any expression of the types enumerated in the ordinance, involving any of the protected categories it describes. An immeasurable range of discussions

involving race, gender, religion, and other specified topics is thus covered, especially since debates about these very topics often do provoke "anger, alarm, or resentment in others."

Since the ordinance as drafted contains no criteria by which to limit such broad application, its prohibitions at minimum extend to virtually all symbolic speech involving race, color, creed, religion, or gender: in sum, to many of the most significant subjects of controversy in our society. By also referring to graffiti as well as to any "characterization," the ordinance further sweeps within its reach much written and oral expression and arguably any drawing, cartoon, or picture.

In contrast, the potentially valid applications of the ordinance are all but

nonexistent. Although the unprotected forms of expression described in Chaplinsky and Brandenburg are well known in First Amendment theory, it would appear that only a tiny number of decisions have been reported that have actually dealt concretely with such behavior.

Because of this disparity between valid and improper applications, it is obvious that the St. Paul ordinance is grossly out of balance. When such unbalanced enactments have been brought before this Court, especially when they targeted expression, they have almost invariably been invalidated pursuant to the overbreadth doctrine. Thornhill v. Alabama, 310 U.S. 88 (1940); Houston v. Hill, 482 U.S. 451 (1987). That doctrine, which is intended to avert the "danger of tolerating in the area of

First Amendment freedoms the existence of a penal statute susceptible of sweeping and improper application," NAACP v. Button, 371 U.S. 415, 433 (1973), was given little more than lip service in the decision of the Minnesota Supreme Court, even though the description of the statute in Button fits the St. Paul ordinance quite precisely.

It is plainly true that this Court has established a preference for the use of a limiting construction rather than facial invalidation. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985). It is also true that the interpretation given an ordinance or a statute by a state's highest court will not be disturbed by this Court. Gooding v. Wilson, 405 U.S. 518 (1972). At the same time, however, this Court has continued to

employ facial invalidation when confronted with an enactment that flouts constitutional boundaries, that provides little foundation for a saving construction, and that inhibits wide areas of potentially valuable expression.

For example, in cases such as Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987), Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Houston v. Hill, supra, this Court invalidated laws in which it discovered fundamental and pervasive defects. The Court concluded that such regulations "simply leave no room for a narrowing construction," Board of Airport Commissioners, 482 U.S. at 475, and that they have "no core of constitutionally protected expression to which

they might be limited," Houston v. Hill, 482 U.S. at 468. Such a law "in all its applications . . . creates an unnecessary risk of chilling free speech." Secretary of State of Maryland, 467 U.S. at 968. In every one of these decisions and in others, this Court could simply have endorsed or adopted limiting constructions similar to the one embraced by the Minnesota Court, thus preserving truncated versions of the regulations at issue. Such an approach, however, would effectively destroy the substantive applications of the overbreadth doctrine and would have the consequence of unleashing those forces that are always ready to restrict free expression.

The decision of the Minnesota Supreme Court threatens to produce exactly such results in Minnesota.

1. As construed by the Court below, the St. Paul ordinance may no longer be overbroad, but it is now incurably vague. Particularly because of the purposes of the ordinance, this vagueness will inevitably deter expression.

2. The conclusion reached by the Minnesota Court explicitly rewards overzealous and politically motivated prosecutions by a city administration that may well seek to generate political capital by continuing to use the ordinance against viewpoints that conflict with the version of political correctness adhered to by the administration.

3. The Minnesota Court's warm and expansive endorsement of the purposes of the ordinance, and the tepid criticism of the drafters' lack of First Amendment sensitivity ("the St. Paul ordinance

should have been more carefully drafted", 464 N.W.2d at 511), will only encourage similar excesses in other jurisdictions. The Court acknowledged the strong expressive content that some symbols can carry (see footnote 1, 464 N.W.2d 508), including burning crosses and swastikas. However, the tone of the Court's response to this recognition actually encourages such overreaching as that engaged in by the St. Paul City Council, rather than controlling it consistent with constitutional principles. It calls into serious question whether the Minnesota Court properly recognized those principles arising under the First Amendment in reaching its decision.

The pervasive vagueness of the reconstructed ordinance noted in point 1 above merits brief additional

consideration. By "limiting" the ordinance to conduct "that amounts to fighting words" or "which is directed to inciting or producing imminent lawless action" (464 N.W.2d at 510), the Court at best has exchanged overbreadth for vagueness. It seems unlikely that these forms of unprotected expression, as described in Chaplinsky and Brandenburg, were intended to constitute criteria that by themselves are sufficient to satisfy constitutional mandates. In the context of a specific statute, with the reference points provided by the statute, as in Chaplinsky or Brandenburg, such descriptions have meaning. But as a consequence of the extraordinary possible reach of the St. Paul ordinance as originally drafted (and as it will of course continue to appear in the code of

ordinances), the construction adopted by the Minnesota Court is basically equivalent to an ordinance stating only that "fighting words are illegal."

In other areas of expression this Court has held that the simple capacity of certain words to be defined with sufficient precision to avoid offending constitutional requirements, e.g., "obscene," does not mean that an ordinance simply prohibiting, for instance, "all obscene publications" would meet constitutional standards. Miller v. California, 413 U.S. 15 (1973). Yet the Minnesota Court has fallen into just such an error in its decision below.

Where people are left to guess at the meaning and application of a penal statute, a constitutional offense is committed that is every bit as fatal to the

enactment as is overbreadth. Papachristou v. Jacksonville, 405 U.S. 156 (1972). Such vagueness, because it fails to give fair notice of prohibited behavior, and because it carries especially significant potential for arbitrary enforcement, is contrary to the fundamental requirements of due process. And these considerations have been applied with particular exactitude when the regulation is aimed at free expression. Smith v. Goguen, 415 U.S. 566 (1974).

The construction adopted by the Minnesota Supreme Court still threatens real and substantial harm. Only a complete redrafting of the ordinance, with specific criteria as to what constitutes "fighting words" and "incitement" in the context of hate crimes, could correct the

flaws in the construction imposed on the ordinance by the Minnesota Court.

CONCLUSION

It is no remedy merely to exchange one constitutional infirmity for another. Yet this is what the Minnesota Supreme Court has done. Its decision represents an unfortunate precedent and a substantial incentive for similarly excessive initiatives. Amicus therefore respectfully asks that the Petition for Certiorari be granted.

Respectfully submitted,

Mark R. Anfinson
Attorney for Amicus Curiae
Minnesota Civil Liberties Union
Lake Calhoun Professional Bldg.
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

Of Counsel:
Deborah Gilman
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-3894

Edward J. Cleary
Attorney at Law
409 Midwest Federal Building
St. Paul, Minnesota 55104
---
(612) 224-3781

April 16, 1991

Mr. Mark R. Anfinson
Attorney at Law
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, MN 55408

RE: In the Matter of the Welfare of R.A.V.

Dear Mark:

I am in receipt of your letter dated April 15, 1991 wherein you indicate that you will be preparing an amicus brief on behalf of the Minnesota Civil Liberties Union and the American Civil Liberties Union with respect to my Petition for Certiorari with the United States Supreme Court.

As counsel for R.A.V., this is written confirmation that I consent to the filing of an amicus brief by the MCLU/ACLU. By this time, you should have received a copy of my Petition and I hope it is helpful to you as you prepare your brief.

Sincerely yours,

EDWARD J. CLEARY

Supreme Court, U.S.
FILED
JUL 16 1991
OFFICE OF THE CLERK

(5)

No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Minnesota

JOINT APPENDIX

EDWARD J. CLEARY
Counsel of Record
409 Midwest Federal Bldg
Saint Paul, MN 55101
(612) 224-3781

MICHAEL F. CROMETT
Of Counsel
1708 American National Bank Building
Saint Paul, MN 55101
(612) 227-5363

Office of the Ramsey County Public Defender

Counsel for Petitioner

STEVEN C. DECOSTER
Counsel of Record
350 St. Peter Street
Suite 400
Saint Paul, MN 55102
(612) 298-5464

Office of the Ramsey County Attorney

Counsel for Respondent

Petition For Certiorari Filed April 11, 1991
Certiorari Granted June 10, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

561

TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries 1

Original Delinquency Petition, Dated June 25, 1990 2

Findings and/or Order, Ramsey County Juvenile Court, Dated June 26, 1990 5

Notice of Motion and Motion to Amend Petition, Dated July 4, 1990..... 8

Amended Delinquency Petition, Dated July 5, 1990 10

Transcript of Proceedings:
Transcript of Hearing on the Constitutionality of the Ordinance, July 13, 1990 13

Partial Transcript of Findings and Order of the Trial Court, Dated July 16, 1990 28

Notice of Appeal to Court of Appeals, Dated July 20, 1990..... 36

Statement of the Case of Petitioner-Appellant, Dated July 20, 1990..... 37

Petition for Accelerated Review by Minnesota Supreme Court, Dated July 27, 1990 40

Order of Minnesota Supreme Court, Dated August 3, 1990 43

Opinion of the Minnesota Supreme Court, Dated January 18, 1991..... 44

Judgment of Minnesota Supreme Court, Dated February 27, 1991 53

Order of United States Supreme Court, Granting Petition For Certiorari, Motion to Proceed *In Forma Pauperis*, Dated June 10, 1991..... 54

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 25, 1991 – Petitioner arrested and original delinquency petition filed in Ramsey County (Minnesota) Juvenile Court

June 26, 1990 – Petitioner denied both counts of delinquency petition and was remanded to custody

July 4, 1990 – Notice of Motion and Motion to Amend Petition filed in Ramsey County Juvenile Court

July 13, 1990 – Hearing held on petitioner's motion to dismiss Count II of Amended Delinquency Petition

July 16, 1990 – Order entered finding city ordinance unconstitutional

July 20, 1990 – Notice of Appeal to Court of Appeals and Statement of the Case of Petitioner-Appellant filed

July 27, 1990 – Petition for Accelerated Review filed in Minnesota Supreme Court

August 3, 1990 – Petition for Accelerated Review granted

December 4, 1990 – Oral argument before the Minnesota Supreme Court

January 18, 1991 – Opinion of the Minnesota Supreme Court entered

February 27, 1991 – Judgment of Minnesota Supreme Court entered

---

State of Minnesota
Second Judicial District
Form JC-24 10-88

DELINQUENCY PETITION
to
RAMSEY COUNTY JUVENILE COURT

In the Matter of the Welfare of R.A.V.

R. A. V. 3/13/73

(first) (middle) (last) (date of birth)

Child's parents, guardian, spouse or nearest relative, noting their relationship and addresses are as follows:

* * *

A. The specific statutory reference for the law(s) alleged to be violated by the child is (are) as follows:

COUNT 1: ASSAULT IN THE FOURTH DEGREE, Minn. Stat. § 609.2231, Subd. 4; 609.17

COUNT II: ASSAULT, St. Paul City Ordinance Sect. 292.01; 609.17

B. The alleged offense(s), if committed by an adult would be considered:

___ a Felony
XX a Non-Felony
___ not applicable

C. Petitioner, being duly sworn, states to the Court and swears to the best of his/her knowledge and belief that said child has committed the following described offenses and that the attached reports or exhibits, consisting of 39 pages, are true and correct and establish probable cause for said belief:

COUNT I

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did wrongfully and unlawfully assault Russell Jones, because of the actual or perceived race of Russell Jones, such action constituting ASSAULT IN THE FOURTH DEGREE, contrary to Minn. Stat. § 609.2231, Subd. 4; 609.17.

COUNT II

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did intentionally or with reckless disregard of so doing, put another, Russell Jones, in fear of immediate bodily harm or death, by placing on public or private property a symbol, to-wit: a burning cross, which is reasonably understood as communicating threats of harm, violence, contempt, or hatred on the basis of race, such action constituting ASSAULT, contrary to St. Paul City Ordinance Section 292.01; 609.17.

WHEREFORE, Petitioner requests that said child be brought before the Juvenile Court to be dealt with according to law.

Subscribed and sworn to before me on

6/25/90 /s/ Lynn M. Dexter
Date Notary Public

/s/ Anne E. Hyland
ANNE E. HYLAND Petitioner

This petition has been drafted under my supervision and I believe that reasonable grounds exist to support the allegations.

/s/ Anne E. Hyland — 6/25/90
Ramsey County Attorney — Date

File No.: 09-D-1231
Date of Hearing:
June 26, 1990

FINDINGS and/or ORDER
Ramsey County Juvenile Court

#11 C8-90-1656
STATE OF MINNESOTA
Second Judicial District

Form JC-36 3-89

IN THE MATTER OF THE WELFARE OF: R.A.V.
TYPE OF HEARING: Violation

Appearances: X Child; X Mother; _ Father

Defense Attorney: Cleary

P.O./S.W.: Petersen

County Attorney: Flint

Other: Evanson

Upon due consideration of the petition(s), the statements made at said hearing, the files and records herein and the reports (if any) submitted to the Court, the Court makes the following FINDINGS OF FACTS and ORDER:

1. This matter comes before the Court pursuant to the petition(s)

	dated	filed by
A)	6-22-90	Joel Hanson
B)	6-25-90	Anne E. Hyland

2. The offense(s) occurred before said child became 18 years of age.

3. X The child

X denied A) Probation Violation

B) 1) Assault 2) Assault

4. _ Counts dismissed _____

5. X There is reason to believe that the child would not remain in the care and control of the person to whose lawful custody that the child would be released.

ORDER

1. This matter is continued to Tuesday, July 17, 1990 – 8:30 – J. Flinn

2. ___ This child is adjudicated _____

3. ___ An adjudication of delinquency is withheld pending disposition.

4. ___ This matter is referred to the Ramsey County Community Corrections Department for an ___ investigation; ___ updated report; ___ supervision by department; ___ staffing.

5. ___ This matter is referred to the Ramsey County Community Human Services Department for an ___ investigation; ___ updated report; ___ supervision by department ___ temporary legal custody ___ staffing.

6. Petty Offender Program ___; PCIP ___.

7. Psych. eval. ___; C.D. eval. ___; detention X; home detention ___; shelter ___.

8. ___ The costs of care a charge upon the funds of the Ramsey County Community Human Services Department.

9. ___ That restitution be determined. CSR hours _____; amount of fine _____

10. ___ The child shall have no contact with _____

11. ___ That the warrant issued for the child's apprehension be quashed and returned to the Juvenile Court Administrator.

12. X (Other) A) Motion to Dismiss Assault 4 denied.

B) Motion to Dismiss Assault (ord.) denied.

C) Detn findings: 1) not likely to remain in care/custody (p.c. run from BTT); 2) danger to others/self (p.c. Assault – 2 cts).

FINDINGS OF FACT AND ORDER RECOMMENDED:

/s/ Donna Tretheway
Referee, Juvenile Court

FINDINGS OF FACT AND ORDER CONFIRMED:

/s/ Charles A. Flinn Jr.
Judge, Juvenile Court

#9 C8-90-1656

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

JUVENILE COURT DIVISION
Court File No. 89-D-1231

In the Matter of the Welfare of:

R.A.V.

NOTICE OF MOTION AND MOTION TO AMEND PETITION

TO: Respondent and his attorney, Ed Cleary

PLEASE TAKE NOTICE that at the time and place set for trial of this matter, the State will move the Court, pursuant to Rule 19.05 of the Minnesota Rules for Juvenile Courts, for leave to amend the petition to read per the attached petition.

This Motion is scheduled for the convenience of counsel and may be advanced upon notice to the Clerk of Juvenile Court and the State at least three (3) days before the motion is scheduled to be heard by the Court.

DATED: July 4, 1990

/s/ Leslie Norsted

Leslie Norsted
J. Lindsay Flint
Assistant Ramsey
County Attorneys
350 St. Peter Street, Suite 540
St. Paul, Minnesota 55102
[612] 292-6724

I CERTIFY THAT ON 7-5-90 I SERVED A COPY OF THE ATTACHED DOCUMENT(S) ON DEFENSE ATTORNEY BY PLACING SAME IN AN ENVELOPE AND DEPOSITING IN THE U. S. MAILS AT ST. PAUL, MINNESOTA

C. Brewster

State of Minnesota
Second Judicial District
Form JC-24 10-88

AMENDED
DELINQUENCY PETITION
to
RAMSEY COUNTY JUVENILE COURT

In the Matter of the Welfare of R.A.V.

R.	A.	V.	3/13/73
(first)	(middle)	(last)	(date of birth)

Child's parents, guardian, spouse or nearest relative, noting their relationship and addresses are as follows:

* * * *

Intake and Court Use Only:

Court File No. 89-D-1231

Date Initial Appr. Trial 7-17-90

___ Active ___ Non-Active

Probation Office _____

Intake Case No. _____

Date Filed Intake _____

S.J.I.S. # _____

A. The specific statutory reference for the law(s) alleged to be violated by the child is (are) as follows:

CT. I: ASSAULT IN THE FOURTH DEGREE, Minn. Stat. § 609.2231, Subd. 4; and 609.05

CT. II: DISORDERLY CONDUCT, St. Paul City Ordinance Sect. 292.02; 609.05.

B. The alleged offense(s), if committed by an adult would be considered:

___ a Felony
XX a Non-Felony
___ not applicable

C. Petitioner, being duly sworn, states to the Court and swears to the best of his/her knowledge and belief that said child has committed the following described offenses and that the attached reports or exhibits, consisting of 39 pages, are true and correct and establish probable cause for said belief:

COUNT I

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did wrongfully and unlawfully assault Russell Jones, because of the actual or perceived race of Russell Jones, such action constituting ASSAULT IN THE FOURTH DEGREE, contrary to Minn. Stat. § 609.2231, Subd. 4; 609.05.

COUNT II

On or about June 21, 1990, in Ramsey County, Minnesota, R.A.V. aiding and abetting and being aided and abetted by others, did, on the basis of race or color, place on private property, to-wit: 290 Earl Street in St. Paul, a symbol or object, to-wit: a burning cross, and R.A.V. knew or had reasonable grounds to know such action would arouse anger, alarm or resentment in others, such action constituting DISORDERLY CONDUCT, contrary to St. Paul City Ordinance Section 292.02; 609.05.

WHEREFORE, Petitioner requests that said child be brought before the Juvenile Court to be dealt with according to law.

Subscribed and sworn to before me on

7/5/90
Date

/s/ Colleen K. Brewster
Notary Public

/s/ Leslie Norsted
Leslie Norsted,
Petitioner

This petition has been drafted under my supervision and I believe that reasonable grounds exist to support the allegations.

/s/ Anne Hyland 7/5/90
Ramsey County Attorney Date

---

[1] STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
JUVENILE COURT DIVISION

FILE NO. 89-D-1231

In the Matter of the Welfare of: CONSTITUTIONALITY HEARING
R.A.V.

The above-entitled matter came on for trial before the Honorable Charles A. Flinn, Jr., one of the judges of the above-named court, in the Juvenile Center of Ramsey County District Court, in the City of Saint Paul and State of Minnesota, commencing on July 13, 1990.

A P P E A R A N C E S

Leslie Norsted and J. Lindsay Flint, Assistant County Attorneys, appeared on behalf of the State of Minnesota.

Edward Cleary, Assistant Public Defender, appeared on behalf of the defendant R.A.V. who was also present.

[2] THE COURT: This is in the matter of the welfare of R.A.V. who is present here with his attorney Mr. Ed Cleary. I have read – Ms. Flint is here with Ms. Norsted on behalf of the County Attorney's Office, and both sides have submitted to me very brief memoranda and copies of cases they deem applicable in this case a couple of days ago. Now, based upon a review of that material yesterday, while it was reasonably detailed, it was not exhaustive just because of the nature of the press

of time. We have been in this case less than a week and it was agreed a week ago that they would submit cases to me by Wednesday and I would read them. We have oral arguments today and I will make a decision by Monday. But I will say this just so that everybody knows where they're headed. It occurred to me after reading this stuff that there clearly is the line of disorderly conduct cases that the state cites that are upheld routinely, it seems, and especially if they're limited to "fighting words," and I have a terrible time in this case sort of laying those alongside the line of cases culminating in *Eichman*. *Johnson and Eichman*, I guess I should really say, the two flag burning cases, and their progeny – I never can remember the names but the Skokie cases and all of these, you know, whereby conduct along those lines has almost, not routinely, but has most frequently been held to be [3] protected by free speech, okay. They just, you know, maybe there is a way of scoring that that I don't understand. Having said that, it seems to me that this case, as I understand the facts, and the question I want to ask you, should I read some more of the facts of this case or shouldn't I? I don't know. All I know about it is it's a flag burning and I don't even know whether it's public or private property.

MS. FLINT: Cross burning.

THE COURT: Cross burning, and I don't know anything other than that, really, about it. I don't know whether it's on public or private property. I don't know anything about the people it was aimed at, if it was even aimed at someone, and maybe I don't need to know that for purposes of the constitutional argument here. But it seems to me that this ordinance has a lot of resemblances

and the case has a lot of resemblances to the flag burning line of cases which I will refer to as opposed to disorderly conduct cases, and that I am not sure this most recent submission of Mr. Cleary's deals with the overbreadth to that and I haven't really considered that. I don't know if that bothers me as much as just the fact that this, you know, as the ordinance does indeed, as the state concedes now, attempt to proscribe expressive conduct and the things that fall from that seem to be in the cases that I [4] have read anyway that makes this unreasonably shaky ground. I want to go back, and having said that, because I thought about it this afternoon, I looked at and read those two cases you cite from '81 and '89 that upheld some cross-burning activity and they kind of now slip out of my mind as to the distinction and I am going to go back and read those in more detail as to how they got around upholding those. And I don't know. So with that background, you can add anything you want. I happen to think that these memorandum and the cases are pretty, you know, they're not clear. If they were clear, we wouldn't be here. At least reasonably exhaustive and helpful and I don't know how much all of our talking and flapping our gums is going to help.

MR. CLEARY: Your Honor, on behalf of R.A.V. I would like to make argument primarily because it may be important to have a record here at a later time. I understand the court reviewed the memoranda and the cases. I think procedurally we should have a record of exactly what is going on here. Originally, R.A.V. was charged with the two count petition dated June 25. Count I was assault and a gross misdemeanor under Minnesota Statute. Count II was an ordinance assault under the Hate

Chapter Ordinance in St. Paul of 292, specifically 292.01. We had some discussion off the record in intervening days [5] after that initial petition was filed. The county attorney then amended Count II from hate crime assault to hate crime disorderly conduct, again under the ordinance. The cite now, 292.02. And a plea of not guilty if it was not actually entered should be noted for the record and the constitutionality was challenged and notified to all parties that this matter would be heard. And the court has indicated that it asks for cases and brief memorandum and today we were scheduled for brief arguments.

I would like to go through that briefly. I realize the court has already reviewed the memorandum. I gave the court a brief analysis of how I feel the matter should be reviewed based on the case law. The first analysis is whether or not there is expressive conduct involved. As the court has noted for the record, the state has conceded that matter so then we move on to the issue of is the regulation content-based. The court mentioned the Skokie case which is *Collin vs. Smith*. That is a 1978 Second Circuit case that made it quite clear constitutionally that in that case, the American Nazi Party could, in fact, march through a Jewish suburb of Chicago wherein many survivors of the Holocaust lived which might be as incendiary a situation as you are going to have. The court made it clear in that situation that regardless of the potential for bad feelings among those Skokie [6] residents, that the ordinance was unconstitutional because it attempted to regulate free expression and it wasn't content-based. It is our position that this ordinance similarly would make such a display of a swastika or other Nazi symbol illegal, which I would say is unconstitutional. But

more importantly, as the court has pointed out, the two flag burning cases, the *Texas vs. Johnson* and *U. S. vs. Eichman*, both have indicated that it is unconstitutional to prevent flag burning under those circumstances. Perhaps the best test of how overbroad this ordinance is is if one of us went outside right now and burned a flag, we would be subject to prosecution for this under this symbol that would be likely to upset someone. I would guess it would upset this court and many veterans of the armed services would be very upset, and that is the key to this entire matter is that you're always going to have symbols and objects that are going to upset a certain group of people.

Now, one of the points the prosecution made in their list of cases, which I think is very important to discuss, is that they're suggesting that the Supreme Court does not support review of a statute on its face. This gets back to what the court said a minute ago. How much do I need to know about the facts of this case? It is our position, and I believe the case law backs this, that they're right [7] insofar as the Supreme Court generally does not wish to have a matter reviewed on its face. What they're wrong about is the exception for First Amendment cases. When a party asserts his First Amendment right, that party may attack an overbroad statute even though his conduct could have been regulated by a statute drawn with the requisite narrow specificity. I would say *Dumbrowski vs. Fliester*, 380 U. S. 479. That is a 1965 case. What the court is saying there, quite simply, is that the issue here is not cross burning. You're going to find the prosecutors are going to emphasize the facts of this case but the facts of this case are not relevant at this stage of the proceeding.

They may be very relevant at a later date. In terms of this statute, it is a First Amendment challenge, so we are attacking it on its face and for purposes of analyzing this ordinance that would mean a Nazi symbol, a flag, cross burning, all kinds of things fall under this. With that analysis, it's clearly unconstitutional because it covers flags and swaztikas [sic] and other political expressions that have clearly been found to be constitutional. I would just say that as I have indicated in part 3 of my analysis that I submitted to the prosecution and to the court that since it is expressive conduct in a private or public forum according to this ordinance, the ordinance is not necessary to serve a [8] compelling state interest and it's obviously not generally drawn to achieve that end. The bottom line as I have indicated here is that this ordinance, like other laws in other states and other jurisdictions, has the same fundamental flaw that *Eichman* cites. It attempts to suppress expression out of concern for its communicative impact. That is the whole reason for the First Amendment. Congress in its wisdom after *Texas vs. Johnson* passed the Flag Protection Act of 1989 which is the *U. S. vs. Eichman* matter. And in that law they indicated that a consensus of the American people do not wish to have the flag burned. The court very clearly points out that that is true. And I would guess that a consensus of the American people don't like Nazi swaztikas [sic] and a lot of other activities that political fringe groups participate in. But that is why we have a First Amendment. And that is – that really is the basis for the constitution. It's the First Amendment and perhaps the most important one and it allows actions and activity that no one approves of. But that is not the point. We are there to protect minority

rights, and in so doing, protect all of our rights. Perhaps the best, in my opinion, after reading all these cases, analysis of what goes through a judge's mind when he has to decide this is Justice Kennedy's concurring opinion which is only one page long in the [9] *Texas vs. Johnson* case –

THE COURT: Let me find it, please.

MR. CLEARY: That is page 2548 of *Johnson*. Justice Kennedy, of course, was the fifth vote. He was making a 5-4 decision. You can read that one-page concurring opinion and you can feel the pain in this Justice having to make this decision. He doesn't want to do it, it's very clear. I am going to quote just briefly from it. The court can read it, but Justice Kennedy says, "The case before us illustrates better than most that the judicial power is often difficult in its exercise. We can not here ask another branch to share responsibility as when the argument is made that a statute is fraud or incomplete. We are presented with the clear and simple statutes to be judged against the pure command of the constitution. The outcome can be later known to none but ours. The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the constitution as we see them compel the result. And so great is our commitment to the process that except in the rare case, we do not pause to express distaste for the result. Perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases." That is precisely what we are faced [10] with here in my opinion. This whole matter is distasteful to all kinds of people, but that isn't the issue nor are the facts of the case the issue. The issue before the court is

that the state has chosen to prosecute R.A.V. under an unconstitutional ordinance that is dramatically overbroad and vague as well.

Now, to excuse the city authorities that pass this ordinance, I am sure it was passed before the flag-burning decisions. I would note that it was passed, however, after *Collins vs. Smith*, and attempts to regulate Nazi swaztikas [sic]. I believe it was unconstitutional even before the flag-burning cases but any case after *U. S. vs. Eichman* I believe the ordinance is clearly unconstitutional. And I would point out that the state's cases that refer to "fighting words" miss one important fact about fighting words. They point out that the First Amendment has its limits and they're absolutely right about that. In reviewing a Law Review article which I do not have for the court, I can cite, however, the author's name is Guard, fighting words is free speech, 58 Washington University Law Review. It's a 1980 article. And he cites the *Chaplinski* case. That is cited by the prosecution. He points out and it's cited also in *State vs. Carpenter*, a Missouri case at 736 Southwest Reporter, 408, that in regards to fighting words, the Supreme Court [11] has held that such offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause immediate violent response by a reasonable recipient. This is nowhere nearly narrowly drawn to cover that type of situation. Fighting words are not the issue here. And we would ask that the court find this ordinance unconstitutional.

THE COURT: Would you, all of you, like, and I think it might be appropriate, is to have these, I am just doing this before I forget it, your original three-page memorandum, four-page memorandum, and their one-pager, and now there are three or four page oral argument, if you will, marked and made a part of the record. I think that might be appropriate. The cases don't need to be because they're just Xerox copies and presumably whoever looks at this has those. But I think those might be helpful. You know, we are not going to have a great big detailed record but I think it might be helpful.

MR. CLEARY: I would note for the record I have no objection. Part of the reason I went into detail in my oral argument was that I received the written oral argument by the state when I walked into the courtroom today. So as long as there is a transcript of my [12] comments, I have no objection to their oral argument also being entered into the record.

THE COURT: I will have these marked as Exhibits 1, 2 and 3 and maybe we should do that now so we have it on the record.

(Petitioner's Exhibits 1 and 2 and Respondent's Exhibit 1 were marked for identification.)

THE COURT: Go ahead.

MS. FLINT: Your Honor, the court has before it basically a written copy of the contents of the state's oral argument and I will only attempt to highlight and perhaps contrast some of the statements made by the respondent. Basically, we are, the respondent is arguing that the ordinance is substantially overbroad and vague based on

the First Amendment challenge and standards. We do concede that the disorderly conduct ordinance is attempting to address expressive conduct by an actor. And that the court, however, the Supreme Court, unlike what the respondent has argued, has stated that in cases where both conduct and speech are involved, and this is a case where we're talking about expressive conduct, therefore conduct and speech, that the facial overbreadth of a statute must be both real and substantial and judged in relation to the statute's intent, its application. And in order to judge it void on its face, statutes are invalid [13] or overbreadth only when the flaw is so, of such substantial concern in context to the statute as a whole. This was stated in *Broderick vs. Oklahoma* which is a 1973 case. It was reiterated by the court in *Brockett vs. Spokane* which is again another First Amendment case and this was in 1985. The court held that it should not extend the invalidation of a statute further than is necessary. It said to the court, you are to look at this statute and apply it to the facts. You are not to facially invalidate it. And that is a First Amendment case. And that is the trend of the court in fact is to include First Amendment cases in the principle that you are to not anticipate a question of constitutional law in advance of the necessity of deciding it, or to formulate a rule of constitutional law broader than is required to the precise facts of the case before the court. Therefore, the court does not need to look at the entire statute and whether it fits this particular, or whether it is unconstitutional on its face. It is only to look at whether the statute is constitutional in the light of the facts before it, the facts before this case, and we will inform the court of that is that this was a cross burning

on private property. It occurred in the yard of the family, of a black family. It occurred at night. It occurred without the parties, whoever had done it, [14] remaining there. They were not present when it was seen by the family. It is clear that this activity was, does fit within what – what the court needs to look at here is the placing of a burning cross on private property where one knows or has reason to know that it will arouse anger, alarm or resentment in others on the basis of race, color, Creed or religion. That is all that the court needs to look at. This disorderly conduct statute, ordinance, also is very similar as the court has already noted to other Minnesota disorderly statutes and ordinances which have been held as constitutional and that is after these decisions of the Supreme Court stating that the court need not look at the entire statute on its face but only as it is applied in the particular case.

That is exactly what the Minnesota Supreme Court has done in several disorderly conduct cases, beginning with *In the Matter of the Welfare of S.L.J.* and that also follows the decision of the Supreme Court in *Chaplinski v. New Hampshire*. The question of whether this behavior is, whether the activity here of the expressive conduct fits within fighting words, the state doesn't believe there is a question about that. Fighting words were defined in *Chaplinski* as "those personally abusive epithets which when addressed to the ordinary citizen are as a matter of common knowledge inherently likely to [15] provoke violent reaction or words, or words which by their very utterance inflict injury or tend to insight immediate breach of the peace." It is not a flag burning, it is not a

political statement. It is in fact a personally abusive activity. It tends to insight an immediate breach of the peace. It inflicted injury on the parties. The respondent, you know, refers again to the flag burning case, the *Eichman* case. These were, the political, publicly burning a flag during the middle of a demonstration against the government. It was not a personal attack on a private individual on private property which is what we have here.

THE COURT: Would that – let me ask you this: would that analysis – what if he burned this cross in front of a gathering of one of the black congregations up here in the Summit-University area, they were having a church meeting, or any big crowd that might be offended by it? I would be offended by it, but this was, as you are telling me, I think, a single cross burning incident directed at least arguably against a family. The marches in Skokie, for instance, were going to be marches of a large group of people who would offend a large group of people. Does that make or break the constitutionality of this? I wouldn't think so. You are telling me that it does.

MS. FLINT: No. What I am saying is, though, that [16] the court does not need to look at that. The court needs only to look at the facts and the Supreme Court has stated you need only look at the facts before you. You do not need to look at anything beyond, is it constitutional given the ~~facts that~~ you have before you?

THE COURT: Okay.

MS. FLINT: Again, in the other cases that respondent has cited, there is an ability to escape the speech that is being given, performed, whatever, in front of them. Here, and the court has said that it is important, and, in

fact, Collin vs. Smith, the court notes there is room under the First Amendment for the government to protect targeted listeners from offensive speech when the speaker intrudes on the privacy of the home or a captive audience cannot practically avoid exposure. We submit that placing a burning cross in the fenced-in yard of a family is just such an intrusion of privacy. Regarding –

THE COURT: I hear what you are saying.

MS. FLINT: Regarding whether a burning cross represents, what it represents, what kind of expressive conduct that is, in *State vs. Kansas,* it's been upheld as a terroristic threat. The court argued that a threat is not limited to a written or oral threat that can be inferred from a physical act such as a cross burning. And the court said to look at all of the circumstances [17] surrounding the communication in order to find, in finding that act of terroristic threats, which is exactly again what the court says to look at in a disorderly conduct situation is to look at the facts surrounding it to find the fighting words. In *U. S. vs. Salyer,* the U. S. Court of Appeals sustained an upward sentence departure in a case where a cross burning had occurred. And what the court looked at were the facts surrounding that activity, and citing that the victims were particularly vulnerable to that message, that activity, that conduct. And it cited that historical connotation of violence, intimidation and terrorism which is symbolized by the burning cross.

We argue that, or we ask the court, I guess, to look at the content of the expressive conduct represented by a burning cross. It is the first step actually in an act of racial violence. And what we see it as equivalent to is the

waiving of a knife before one thrusts it. It's the pointing of a gun before it's fired. Lighting of a match before arson. And it's a hanging of the noose before the lynching. It's just the first step in the act of assault. And it's no more protected than holding a gun to a victim's head. And it's perhaps the most, the ultimate expression of fighting words. We ask the court to narrowly review the St. Paul Bias Motivated Disorderly [18] Conduct Ordinance and uphold it as a constitutional restriction on free speech under the First Amendment as unprotected fighting words.

MR. CLEARY: Your Honor, I would like a chance to briefly comment, if I may.

THE COURT: Go ahead.

MR. CLEARY: I will begin by stating I don't understand the prosecutor attempting to suggest things such as noose hanging from trees. I think that is a sign of weakness of their argument that they are going to try to smoke it up in some fashion that we are all going to be seeing nooses from trees and guns in people's heads. It seems to me from their argument one of the key questions before this court is whether one is to be biased by the particular facts of a given situation or are we examining an ordinance under the First Amendment for its constitutionality. They argue, in fact, it's a good final argument when the trial comes, but that is not the issue now. I don't have the entire case, I have the headnotes and from *Dumbrowski* which I cited earlier which states that a First Amendment challenge is not a question of analyzing the facts. On the second page at the very bottom, I have underlined a paragraph. I would like to cite that. This

was a First Amendment challenge. "By permitting determination of the invalidity of these [19] statutes without regard to the permissibility of some regulation of the facts in particular cases, we have in effect avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact that the prosecution unaffected by the prospects of its success or failures." It's not a fact determination at this stage; it's an analysis of an ordinance under the First Amendment for overbreadth and vagueness and I would just make that clear that that is our position.

THE COURT: Okay. The court will take the matter under advisement. I think you can take the defendant back.

(WHEREUPON, the proceedings were concluded.)

* * *

[1] ORIGINAL

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
JUVENILE COURT DIVISION

Juvenile Court File No. 89-D-1231

In the Matter of the Welfare of: PARTIAL TRANSCRIPT

R.A.V. OF PROCEEDINGS

The above-entitled matter came on for hearing before the Honorable Charles A. Flinn, Jr., Judge of District Court, Juvenile Court Division, on Monday, July 16th, 1990, in the Third Floor Courtroom of the Ramsey County Juvenile Service Center, 480 St. Peter Street, Saint Paul, Minnesota.

LESLIE NORSTED and J. LINDSAY FLINT, Assistant Ramsey County Attorneys, appeared on behalf of the petitioner.

EDWARD J. CLEARY, Assistant Ramsey County Public Defender, appeared on behalf of the respondent, R.A.V., who was also present in court.

Rick Peterson appeared on behalf of the Ramsey County Community Corrections Department.

The respondent, R.A.V. and his attorney, Mr. Cleary, waived the appearance of the respondent's parents at this hearing.

* * *

[2] (WHEREUPON, the following proceedings took place in open court, commencing at approximately 9:30 o'clock, a.m.:)

THE COURT: This is in the matter of the welfare of R.A.V., file number 89-D-1231.

Let's get the formal appearances, please, for purposes of the record. Mr. Peterson.

MR. PETERSON: Rick Peterson from the probation department.

MS. FLINT: Lindsay Flint, Ramsey County Attorney's Office.

MS. NORSTED: Leslie Norsted, Ramsey County Attorney's Office.

MR. CLEARY: Edward J. Cleary, Ramsey County Public Defender's Office, on behalf of R.A.V.

THE COURT: The matter is before the Court this morning on the issue of the constitutionality of the ordinance of the City of Saint Paul, Section 292.02, which is a conduct – disorderly conduct ordinance, making someone who places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion; that disorderly conduct is then a misdemeanor. That is [3] one of two charges against this respondent; the second being a gross

misdemeanor state statute, which is not an issue in this proceedings [sic].

Defendant or respondent has raised the issue of the constitutionality of this statute. Brief briefs were filed with the Court and a number of cases furnished to the Court. Oral argument was held on the 13th, Friday the 13th, 1990, and we are here this morning for decision.

And I have reviewed all of the cases several different times and although I am not going to be very eloquent here this morning, the Court feels that the ordinance is quite clearly unconstitutional and so rules.

I do that having full mind of Justice Kennedy's great agony in the JOHNSON, TEXAS versus JOHNSON decision, dealing with the flag burning, where he waxes quite eloquently about how difficult the job is to do at times when the conduct is so egregious in terms of what main stream people would normally think is proper. And I think that is the situation I find myself in here.

At least the alleged conduct here is something I in no way agree with; in fact, I find completely reprehensible. I am not saying that the respondent has or has not done that, this conduct; it is just the [4] alleged conduct is something I personally find abhorrent. But that is not what we are about and that is what Kennedy talks about.

And I have reviewed the cases cited by the State, clearly they deal with the upholding of disorderly conduct statutes, which carve out the fighting words exception for constitutionality and have done so in both state and federal cases for a number of years. The State

attempts to make the same argument here and I just don't think it stands up.

The two cases the State cites dealing with flag burning issues that were held constitutional or – just aren't constitutional cases. The first one is State versus MILLER, which is a terroristic threats case, I believe, that is the terroristic threats one, right?

MS. NORSTED: That is correct, Your Honor.

THE COURT: And whether that conduct of burning a cross could be considered to be the crime of terroristic threats. I think that's the case where they specifically say that the constitutionality of the statute is not challenged.

The second case the State cites, U.S. versus SALYER, is an enhancement of sentence case, dealing with the Federal Sentencing Guidelines and again, there is no constitutionality issue raised in or at least discussed [5] in the opinion that I could see.

Conversely, when you look at the line of cases cited, cited by the respondent here, I think they follow almost to a tee the issue that is raised by the respondent. The cases, of course, end with the two flag burning cases, TEXAS versus JOHNSON and the EICHMAN case, U.S. versus EICHMAN. But going back even to the Skokie case, COLLIN versus SMITH and BOOS versus BARRY, which is the Washington D.C. case; they all show remarkable to me at least a bright line leading to my finding this ordinance unconstitutional.

The State has conceded that there is the conduct prescribed in the ordinance constitutes expressive conduct; I think it's content based. And I can't see that the ordinance serves a compelling state interest or is so narrowly drawn to achieve an end that makes it constitutional, which would be the third leg. I believe that clearly, although the opinions may be unpopular, that the ordinance violates the right of free speech set forth in the First Amendment and, therefore, I rule it unconstitutional.

Now, what is next?

MS. NORSTED: Your Honor, the State may be appealing the Court's decision this morning, Rule 31.02 addresses appealable orders.

[6] THE COURT: Okay, let me find that please. (Judge finds rule). Yes, okay.

MS. NORSTED: The one thing I note, Your Honor, in Rule 31.02, is that the County must make an appeal related to all pretrial issues. So, in this case what we need to do is to have essentially a full pretrial conference.

We have not talked about whether Mr. Cleary intends to contest the admissibility of the respondent's statements to the police, whether he intends to contest the search of the residence in which the respondent was living at the time of the incident. There are several potential Rasmussen type issues. And so at this time I think we need to address whether those are going to be waived or raised.

MR. CLEARY: Well, in no way can I waive either one of those. There are some real questions about the statements taken. As far as the search of the house, I would have to review my file further, because I wasn't prepared for a Rasmussen hearing this morning.

MS. NORSTED: We didn't intend to go forward with a Rasmussen hearing this morning.

THE COURT: No, no. But if we are going to do that, if you are going to do some Rasmussen issues, I am reading the rule as we go along here, it appears that we [7] have to get them all out of the way. Of course, that makes sense in a way; then there is not piece-meal appeals every time we go through a Rasmussen issue.

So, if you've got some Rasmussen issues, what you need to do I think is you have to go out and frame them and we do have some time scheduled tomorrow for this case and we will do the Rasmussen.

MR. CLEARY: Okay, that is fine.

MS. NORSTED: Good.

MR. CLEARY: That will work out.

THE COURT: Will that work?

MR. CLEARY: Yes.

MS. NORSTED: That will work.

THE COURT: In any event, once we get that done, you have got what, how many, five days to decide whether you are going to appeal?

MS. NORSTED: That is right, Your Honor.

THE COURT: Well, I don't think we have any issue as to what we are going to do with the respondent, until you do decide to appeal, right?

MS. NORSTED: That's true. We could address that issue tomorrow, Your Honor.

THE COURT: That is true.

MS. NORSTED: We will definitely know tomorrow, after we are done handling the Rasmussen [8] issues, whether we intend to go forward with the trial or whether we will be filing an appeal.

THE COURT: Just for planning purposes, it is my understanding your present intention is you think you will appeal, is that right?

MS. NORSTED: That is my understanding.

THE COURT: All right. Well, in light of that, Mr. Peterson, then we have a petition pending somewhere out here?

MR. CLEARY: There is a runaway petition.

MS. NORSTED: That is right.

MR. CLEARY: But just so I'm clear, we are not going to do a trial tomorrow in either case? I mean –

THE COURT: No.

MR. CLEARY: Even if the appeal –

THE COURT: They can't, because they have got to do all – They have to take their appeal and do everything before jeopardy attaches.

MR. CLEARY: Right. I guess what I meant is if you decide not to appeal.

If they decided not to appeal and go forward on the remaining count; as I understand it, we are just having the Rasmussen tomorrow?

I mean I am not prepared – at least I want to know right now if we have to prepare for trial. And if so, I [9] think we need more time than we have tomorrow. Which means that we have to address R.A.V.'s situation if we set another trial date. It gets a little – do you understand my problem? After the Rasmussen, you say we are not appealing, technically the trial could commence.

MS. NORSTED: Right.

MR. CLEARY: So, that is my problem, is that we can't really do that, because we don't know until the last second what's going to happen. I mean –

THE COURT: Okay, stop off the record a minute and let's discuss that.

(Off-the-record discussion, followed by a short recess.)

* * *

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

IN THE MATTER OF THE WELFARE OF R.A.V.,
STATE OF MINNESOTA,
Petitioner,
vs.
R.A.V.,
Respondent.

C8-90-1656

NOTICE OF APPEAL TO COURT OF APPEALS

Trial Court Case No. 89-D-1231
Date of Order Appealed From: July 16, 1990

PLEASE TAKE NOTICE that the above-named petitioner State of Minnesota appeals to the Court of Appeals of the State of Minnesota from the order of the Honorable Charles A. Flinn, Jr., Judge of District Court, dismissing Count II of an amended delinquency petition. The order was entered on July 16, 1990.

TOM FOLEY
RAMSEY COUNTY ATTORNEY

DATED: July 20, 1990

BY: /s/ Steven C. DeCoster
Steven C. DeCoster
Assistant Ramsey County Attorney
350 St. Peter Street, Suite 400
St. Paul, Minnesota 55102
Telephone: (612) 298-5464

OFFICE OF
APPELLATE COURTS
FILED
JUL 20 1990

STATE OF MINNESOTA
IN COURT OF APPEALS

IN RE MATTER OF THE WELFARE OF R.A.V.,
STATE OF MINNESOTA,
Petitioner,
vs.
R.A.V.,
Respondent.

C8-90-1656

STATEMENT OF THE CASE OF PETITIONER-APPELLANT

JUVENILE COURT CASE NUMBER: 89-D-1231

APPELLATE COURT CASE NUMBER:

1. **Court of case origination:**

   Ramsey County District Court, Juvenile Court Division

2. **Jurisdictional statement.**

   Appeal taken from order dismissing Count II of amended juvenile Court petition of delinquency under Minn. Stat. § 260.291 and Minn.Rules Crim.Proc. § 28.04.

3. **Type of litigation and designate any statutes at issue.**

   Petition alleging delinquency filed in the District Court, Ramsey County, Juvenile Court Division.

   Constitutionality of Ordinance § 292.02 of the City of St. Paul is at issue.

4. Brief description of claims, defenses, issues litigated and result below.

Respondent moved to dismiss Count II of an amended juvenile petition which alleged his violation of St. Paul Ordinance § 292.02 by placing on private property a burning cross "reasonably understood as communicating threats of harm, violence or hatred on the basis of race, color, creed or religion."

The trial Court ruled that the statute was substantially overbroad and vague and thereby an impermissible infringement of the right of free speech in the First Amendment to the U.S. Constitution.

5. Issues proposed to be raised on appeal.

(a) St. Paul Ordinance § 292.02 concerning bias-motivated disorderly conduct is valid on its face and as applied to respondent's conduct.

(b) The ordinance is not substantially overbroad.

(c) It is not impermissibly vague.

(d) The act proscribed is the burning of a cross on the fenced property of a black family at night which the actor knows or has reason to know will communicate threats of harm, violence or hatred on the basis of race, color, creed or religion. This constitutes that type of "fighting words" which may be punished without constitutional violation.

6. Is transcript required? Yes **If so, full or partial transcript?**

Transcript of arguments of counsel on July 13, 1990 and Court's decision on July 16, 1990 are required and have been ordered. There is no need for a transcript of the Rasmussen Hearing on July 17, 1990.

7. Is oral argument requested? Yes. **If so, is argument requested at a location other than that provided in Rule 134.09, Subd. 2?** No.

8. Are formal briefs necessary?

Yes.

9. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

For Respondent:

Edward Cleary, Esq.
409 Midwest Federal
Building
St. Paul, MN 55101
(612) 224-3781

Dated: July 20, 1990

For Petitioner-Appellant:

TOM FOLEY
RAMSEY COUNTY
ATTORNEY

/s/ Steven C. DeCoster
By: Steven C. DeCoster
Assistant County Attorney
350 St. Peter St., Suite 400
St. Paul, Minnesota 55102
(612) 298-5464

Atty. Reg. No. 21787

C8-90-1656

STATE OF MINNESOTA

IN SUPREME COURT

IN RE MATTER OF THE WELFARE OF R.A.V.	**PETITION FOR ACCELERATED REVIEW**
STATE OF MINNESOTA, Petitioner,	**Appellate Court Case No. C8-90-1656**
vs.	
R.A.V., Respondent.	

TO: The Supreme Court of the State of Minnesota

Petitioner State of Minnesota requests accelerated review by the Supreme Court of the above-entitled matter upon the following grounds:

1. Status of Appeal

Notice of Appeal filed in the Court of Appeals and docketed on July 20, 1990 from order dismissing a petition alleging delinquency filed in the District Court, Ramsey County, Juvenile Division on grounds the St. Paul ordinance proscribing bias-motivated disorderly conduct as applied violated the First Amendment to the United States Constitution.

2. Statement of Facts

The act of delinquency alleged constituted the placement of a burning cross by respondent on private

property in the fenced-in yard of a black family where the respondent knew or had reason to know the act would arouse anger, alarm, or cause resentment of the black family on the basis of race or color.

3. Statement of Legal Issues to be Raised

(a) St. Paul Ordinance § 292.02 concerning bias-motivated disorderly conduct is valid on its face and as applied to respondent's conduct.

(b) The ordinance is not substantially over-broad.

(c) It is not impermissibly vague.

(d) The act proscribed is the burning of a cross on the fenced property of a black family at night which the actor knows or has reason to know will communicate threats of harm, violence or hatred on the basis of race, color, creed or religion. This constitutes that type of "fighting words" which may be punished without constitutional violation.

4. Arguments

(a) The questions, implicating as they do sensitive issues under the First Amendment to the United States Constitution, are important ones upon which the Supreme Court should rule;

(b) The trial Court has ruled against the constitutionality of a St. Paul ordinance;

(c) The resolution of the questions presented has possible impact, statewide and beyond;

(d) The trial Court's ruling is in conflict with decisions of the United States Supreme Court and this Court in the area of terroristic threats and fighting words.

For these reasons, the petitioner requests an order granting accelerated review of this appeal now pending in the Court of Appeals.

Respectfully submitted,

HUBERT H. HUMPHREY, III.
Minnesota Attorney General

TOM FOLEY
Ramsey County Attorney

/s/ Steven C. DeCoster
By: STEVEN C. DeCOSTER
Assistant Ramsey County Attorney
350 St. Peter Street, Suite 400
St. Paul, Minnesota 55102
Telephone: (612) 298-4421
Attorneys for Respondent
Atty. reg. No. 21787

Dated: July 27, 1990

STATE OF MINNESOTA
IN SUPREME COURT
C8-90-1656

In the Matter of the Welfare of:

R.A.V.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for accelerated review be, and the same is, granted. All briefs shall be filed with this court within the original time limitations provided by the Minnesota Rules of Civil Appellate Procedure. The matter will be placed on the calendar for oral argument before the court sitting en banc on a date to be later determined.

Dated: August 3, 1990

BY THE COURT:

/s/ Glenn E. Kelley
Associate Justice

STATE OF MINNESOTA

IN THE SUPREME COURT

C8-90-1656

Ramsey County — **Tomljanovich, J.**
Took No Part, Gardebring, J.

In the Matter of the Welfare
of R.A.V.

Filed: January 18, 1991
Office of Appellate Courts

SYLLABUS

St. Paul, Minn. Leg. Code § 292.02 (1990) prohibiting bias-motivated disorderly conduct is not substantially overbroad because it can be narrowly interpreted to prohibit only expressive conduct that falls outside first amendment protection.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

Tomljanovich, J.

The City of St. Paul alleges that between 1:00 a.m. and 3:00 a.m. on June 21, 1990, R.A.V. participated in burning a cross inside the fenced yard of an African American family's home. In connection with this incident, the City charged R.A.V. with violating St. Paul, Minn. Leg. Code § 292.02 (1990), which provides that

> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. The trial court, however, dismissed the charge prior to trial on the ground that the ordinance censors expressive conduct in violation of the first amendment to the United States Constitution. The City now appeals that decision, contending that the ordinance can be narrowly construed to reach only conduct that falls outside first amendment protection. In order to prevail, the City must demonstrate "clearly and unequivocally, first, that the trial court erred in its judgment and, second, that unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Joon Kyu Kim*, 398 N.W.2d 544, 547 (Minn. 1987) (citing *State v. Webber*, 262 N.W.2d 157, 159 (Minn. 1977)).

Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

---

[1] *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of

(Continued on following page)

R.A.V. does not dispute that the City may prosecute individuals who engage in such actions as he is alleged to have perpetrated. Rather, he challenges the particular ordinance under which he was charged on the ground that it is substantially overbroad. In essence, R.A.V. contends that the St. Paul bias-motivated disorderly conduct ordinance potentially censors so many constitutionally protected activities on its face that it must be completely invalidated. We disagree.

The overbreadth doctrine, an exception to standing requirements peculiar to disputes regarding the extent to which the first amendment protects speech and other expressive conduct, permits an individual to facially challenge a provision even though that individual engaged in conduct that is itself subject to prosecution. *See State v. Krawsky*, 426 N.W.2d 875, 876 (Minn. 1988); *see also New York v. Ferber*, 458 U.S. 747, 768-69 (1982). The exception to the general rules of standing is intended to overcome the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also Dombroski v. Pfister*, 380 U.S. 479, 487 (1965). Thus,

---

(Continued from previous page)

> certain groups. The swastika, the Klan robes, the burning cross are examples of signs – like all signs– that have no meaning of their own, but that convey a powerful message to both the user and the recipient of the sign in context.

Id. (footnotes omitted).

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). If the challenged provision is substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Id.* at 503-04 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

While the overbreadth doctrine is clearly essential to the protection of free expression, the complete invalidation of legislatively adopted laws it permits is "strong medicine" that this court does not hastily prescribe. *See Broadrick v. Oklahoma*, 413 U.S. at 613. Where the overbreadth of the challenged law is both "real" and "substantial," *see New York v. Ferber*, 458 U.S. at 770, and where "the words of the [law] simply leave no room for a narrowing construction," *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987), "so that in all its applications the [law] creates an unnecessary risk of chilling free speech," *Secretary of State of Md. v. Joseph H. Munson Co.* 467 U.S. 947, 968 (1984), this court will completely invalidate it. When possible, however, this court narrowly construes a law subject to facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression. *See*

In re S.L.J., 263 N.W.2d 412, 419 (Minn. 1978) (disorderly conduct statute limited to "fighting words" to preserve constitutionality); *New York v. Ferber*, 458 U.S. at 769 n. 24 ("If the invalid reach of the law is cured [by narrow judicial construction,] there is no longer reason for proscribing the statute's application to unprotected conduct." *Id.*); *Lewis v. City of New Orleans*, 415 U.S. 130 (1973) (invalidating state statute where state supreme court did not narrow construction on previous remand). We conclude that the ordinance in question can be narrowly interpreted to reach only unprotected conduct, thereby sufficiently decreasing the possibility that those who wish to engage in protected expressive conduct will be dissuaded from doing so by the potential of prosecution and sparing that ordinance from the complete invalidation R.A.V. requests.

Although the United States Supreme Court's recent decision in *Texas v. Johnson*, ___ U.S. ___, 109 S. Ct. 2533 (1989) did not directly address an overbreadth challenge,[2] that decision is instructive as to the scope of constitutionally protected expressive conduct. In *Johnson*, the Court held that Texas could not prosecute an individual for burning a United States flag outside Dallas City Hall under the state's "desecration of venerated objects" statute. *See id.* at 2548. The Court noted that the state had *not* alleged that Johnson's conduct actually disturbed the

---

[2] The Court avoided Johnson's claim that the statute was substantially overbroad by concluding that his particular conduct – burning a flag without threatening public safety or order – was itself protected expression and that his conviction was thus unconstitutional. *See Texas v. Johnson*, 109 S. Ct. at 2538 n. 3.

peace or that it threatened to immediately do so. *Id.* at 2541, 2548. Rather, the state contended that *every* flag burning necessarily possessed the potential to disrupt public safety and order, which empowered it to censor all such conduct. *Id.* at 2542. In rejecting this argument, the Court stated that the first amendment does not permit "the Government to *assume* that *every* expression of a provocative idea will incite a riot, but [instead requires] careful consideration of the *actual circumstances* surrounding such expression." *Id.* (emphasis added). Although in prosecuting Johnson, the state made such an impermissible assumption, the Court clearly indicated that its decision reversing Johnson's conviction did not alter or undermine the states' authority to prohibit expressive conduct likely to provoke imminent lawless action, *id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)), or constituting "fighting words," *id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)) – "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572.

Unlike the flag desecration statute at issue in *Texas v. Johnson*, the challenged St. Paul ordinance does not on its face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution. Rather, the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias. In *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978), this court narrowly construed Minn. Stat. § 609.72, subd. 1(3) (1990), which prohibits "offensive, obscene, or abusive language or * * * boisterous and noisy conduct tending

reasonably to arouse *alarm, anger, or resentment in others,"* (emphasis added) to refer only to "fighting words," *S.L.J.*, 263 N.W.2d at 419, thereby preserving it in the face of an overbreadth attack. Similarly limited to expressive conduct that amounts to "fighting words" – conduct that itself inflicts injury or tends to incite immediate violence, *see Chaplinsky v. New Hampshire*, 315 U.S. at 572 – the ordinance in question withstands constitutional challenge.

St. Paul's bias-motivated disorderly conduct ordinance is also constitutional to the extent it prohibits conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447 (footnote omitted). Where the "anger, alarm or resentment" the ordinance speaks of rises to the level of "imminent lawless action," *id.* at 449, the City is permitted to intervene and censor the provocative conduct. *See Texas v. Johnson*, 109 S.Ct. at 2542. Because the City's disorderly conduct ordinance is reasonably subject to an interpretation limiting its scope to such conduct as *Brandenburg* places outside first amendment protection, we conclude that it is not substantially overbroad.[3]

---

[3] The St. Paul ordinance is significantly different from the provision the United States Supreme Court invalidated in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). That provision banned all "First Amendment activities" from the central terminal area of Los Angeles International Airport. *Id.* at 571. The Court concluded the provision could not be preserved because its language "simply [left] no room for a narrowing construction." *Id.* at 575. *See also Secretary of*

(Continued on following page)

In upholding the challenged ordinance against R.A.V.'s constitutional attack, we do not take lightly the first amendment issues that his attack raises. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 109 S. Ct. at 2544. "Resort to epithets or personal abuse," however, "is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act [raises] no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940). Although the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980), and therefore is not prohibited by the first amendment.

We therefore reverse the trial court's pretrial order declaring the City of St. Paul's bias-motivated disorderly

---

(Continued from previous page)

State of Md. v. Joseph H. Munson Co., 467 U.S. at 965-67 (statute limiting expenses of all charitable fund raising operations not subject to limiting construction); *cf. CSC v. Letter Carriers*, 413 U.S. 548, 580-81 (1973) (invalidation improper where statute "covers a whole range of easily identifiable and constitutionally proscribable * * * conduct").

conduct ordinance unconstitutional. Count two of the amended juvenile petition charging R.A.V. with violating that ordinance is reinstated and the case is remanded for trial.

STATE OF MINNESOTA

[X] Supreme Court
[ ] Court Of Appeals

In the Matter of the Welfare of R.A.V.

JUDGMENT

C8-90-1656

Appellate Court Case Number

89D1231

Trial Court Case Number

Pursuant to and order of Court heretofore duly made and entered in this cause it is determined and adjudged that the reversed of the Court below, herein appealed from, to wit, of the District Court within and for the County of Ramsey be and the same hereby is reversed in accordance with the opinion and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT 2-27-91
Dated

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: /s/ K. Erdmann
Assistant Clerk

Supreme Court of the United States

No. 90-7675

R. A. V.,

Petitioner

v.

City of St. Paul, Minnesota

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Minnesota.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 10, 1991

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

6

No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Minnesota

BRIEF FOR PETITIONER

EDWARD J. CLEARY
Counsel of Record
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

MICHAEL F. CROMETT
Of Counsel
1708 American National Bank Building
Saint Paul, MN 55101
(612) 227-5363

Office of the Ramsey County Public Defender

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May a local government enact a content-based, "hate-crime" ordinance prohibiting the display of symbols, including a Nazi swastika or a burning cross, on public or private property, which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender" without violating overbreadth and vagueness principles of the First Amendment to the United States Constitution?

2. Can the constitutionality of such a vague and substantially overbroad content-based restraint of expression be saved by a limiting construction, where the language of the ordinance provides no core of "easily identifiable and constitutionally proscribable expression," restricting its application to "fighting words" or "imminent lawless action?"

LIST OF PARTIES

The petitioner is R.A.V., a juvenile who was 17 years old on June 21, 1990, the date of the allegations. His initials are used because of the confidentiality of juvenile proceedings under Minnesota law. Respondent is the City of St. Paul, Minnesota.

TABLE OF CONTENTS

Page

Opinion Below 1
Jurisdiction 1
Statutes Involved 1
Statement of the Case 2
Summary of Argument 4
Argument
I. St. Paul City Ordinance section 292.02 is substantially overbroad on its face in violation of the First Amendment to the United States Constitution 7
A. The ordinance regulates protected expressive conduct, including symbolic conduct and written speech, on the basis of the content of the expression 8
B. There is no compelling state interest served by this law and the ordinance is not narrowly drawn to achieve any legitimate interest 12
II. St. Paul City Ordinance section 292.02 cannot be narrowly construed without continuing to violate overbreadth and vagueness principles of the First Amendment to the United States Constitution 21
A. The ordinance is not susceptible to a narrowing construction because it has no core of easily identifiable and constitutionally proscribable conduct which falls outside the protection of the First Amendment 22
B. The ordinance cannot be narrowed to fit established exceptions to the First Amendment without continuing to have a significant chilling effect on protected expression 27
C. This Court should not create any new exceptions to the First Amendment protection of free speech 33

TABLE OF CONTENTS – Continued

Page

Conclusion 36

APPENDIX[1]

A. *List of Cases*, undated, submitted by Assistant Ramsey County Attorneys A-1

B. *MEMO*, dated July 10, 1990, Issue: Constitutionality of St. Paul City Ordinance section 292.02, submitted by Edward J. Cleary B-1

C. *MEMORANDUM*, dated July 13, 1990: State's Oral Argument C-1

[1] The written materials submitted to the trial court were not included in the Joint Appendix because they were not in the district court or appellate court files. The trial court did, however, specifically make these materials part of the record. (J.A. 21). Counsel agreed that these materials should be appended to the brief on the merits so that this Court would be able to review these materials if it chooses to do so.

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 31

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 23, 24

Boos v. Barry, 485 U.S. 312 (1988) 8, 10, 11, 12, 15

Brandenburg v. Ohio, 395 U.S. 444 (1969) 16, 29

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 7, 9, 29

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 27, 33, 34

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 10

City of Houston v. Hill, 482 U.S. 451 (1987) 26

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 30

Cohen v. California, 403 U.S. 15 (1971) 17, 24, 28, 34

Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) 29

Dombrowski v. Pfister, 380 U.S. 479 (1965) 7, 31

Eaton v. City of Tulsa, 415 U.S. 697 (1974) 28

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 23

Garrison v. Louisiana, 379 U.S. 64 (1964) 32

Gooding v. Wilson, 405 U.S. 518 (1972) 27

Hess v. Indiana, 414 U.S. 105 (1973) 29

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 22

TABLE OF AUTHORITIES – Continued

Page

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 10, 11, 17, 32, 34

Keyishian v. Board of Regents, 385 U.S. 589 (1967) ..9, 20

Kolender v. Lawson, 461 U.S. 352 (1983) 22, 27, 30

Lewis v. City of New Orleans, 415 U.S. 123 (1974) 27

NAACP v. Button, 371 U.S. 415 (1963) 12, 14, 31

NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) 29

Norwell v. City of Cincinnati, 414 U.S. 14 (1973) 27

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 15

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 8, 17

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 11

Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) 15

Schacht v. United States, 398 U.S. 58 (1970) 9, 29

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) 23, 25, 26

Shelton v. Tucker, 364 U.S. 479 (1960) 15

Smith v. Goguen, 415 U.S. 566 (1974) 30

Spence v. Washington, 418 U.S. 405 (1974) 9, 34

Street v. New York, 394 U.S. 576 (1969) ... 17, 18, 29, 34

Stromberg v. California, 283 U.S. 359 (1931) 9

Terminiello v. Chicago, 337 U.S. 1 (1949) 7, 17, 18, 34

TABLE OF AUTHORITIES – Continued

Page

Texas v. Johnson, 491 U.S. 397 (1989) 9, 17

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 9

United States v. Eichman, 496 U.S. ___, 110 S.Ct. 2404 (1990) 9, 15, 17, 18, 34

United States v. Grace, 461 U.S. 171 (1983) 15

United States v. Reese, 92 U.S. 214 (1876) 27

Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620 (1980) 12, 13, 14, 23

Virginia v. American Booksellers Assn., 484 U.S. 383 (1988) 22

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 16

FEDERAL DECISIONS:

Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) 16, 32

Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) 20

Knights of Ku Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990) 17

MINNESOTA DECISION:

In re R.A.V., 464 N.W.2d 507 (Minn. 1991) 12

UNITED STATES CONSTITUTION

Amendment I ..... *passim*

Amendment XIV (Section One) 1

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES:

28 U.S.C. § 1257(a) (1988) 1

H.R. 1380 34

MINNESOTA STATUTES:

Minn. Stat. § 609.02 (1990) 13

Minn. Stat. § 609.2231 (1990) 3, 13

Minn. Stat. § 609.595 (1990) 14

Minn. Stat. § 609.605 (1990) 14

Minn. Stat. § 609.713 (1990) 13

Minn. Stat. § 609.72 (1990) 14

Minn. Stat. § 609.746 (1990) 14

Minn. Stat. § 609.748 (1990) 14

ORDINANCE:

St. Paul, Minn., Ordinances ch. 292, § 292.02 (1990) *passim*

OTHER SOURCES:

Bollinger, *The Tolerant Society* (Clarendone Press, 1986) 35

Bolt, *A Man For All Seasons* (Vintage Books, 1960) 4

Carnegie Foundation for the Advancement of Teaching, *Special Report: Campus Life in Search of a Community* (Princeton Press, 1990) 34

D'Souza, *The Illiberal Education* (The Free Press, 1991) 19, 32

Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853 (1991) 25, 26, 30

TABLE OF AUTHORITIES – Continued

Page

Gard, *Fighting Words and Free Speech*, 58 Wash. U.L.Q. 531 (1980) 28

Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 33

Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) 33

Monaghan, *Overbreadth*, 1981 S.Ct. Rev. 1 8

Neier, *Defending My Enemy: American Nazis, The Skokie Case, and the Risks of Freedom* (E.P. Dutton, 1979) 33

Silberman, "A Letter to the Dartmouth Club," *1990 First Amendment Law Handbook* (Clark Boardman Company, Ltd., 1990) 21

Strossen, *Regulating Racist Speech On Campus: A Modest Proposal*, 1990 Duke L.J. 484 ..... 27, 32, 34

Webster's New World Dictionary (Warner Books, 1987) 19

OPINION BELOW

The opinion of the Minnesota Supreme Court (J.A. 44-52) was reported at 464 N.W.2d 507 (Minn. 1991). The opinion of the district court (J.A. 28-35) was not reported.

JURISDICTION

The Minnesota Supreme Court entered judgment on February 27, 1991. (J.A. 53). R.A.V. filed a petition for writ of certiorari and motion to proceed *in forma pauperis* in this Court on April 11, 1991. This Court granted the petition and motion on June 10, 1991 (J.A. 54). Jurisdiction of this Court is invoked pursuant to section 1257 (a), Title 28, United States Code.

STATUTES INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section One, Fourteenth Amendment To The United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

St. Paul City Ordinance section 292.02: Disorderly Conduct:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

STATEMENT OF THE CASE

On June 21, 1990, between 1:00 a.m. and 3:00 a.m., it is alleged that some small crosses, made of wooden chair legs held together by tape, were burned on the property of an African American man in St. Paul by some young males. At issue before this Court is the amended petition, filed in Ramsey County District Court, Juvenile Division, on July 5, 1990, which alleges in Count II that R.A.V. and others engaged in disorderly conduct by placing a burning cross on private property knowing or having reason to know that that action would arouse anger, alarm, or resentment in others on the basis of race or color. (J.A. 10).

On June 25, 1990, the Ramsey County Attorney's Office filed a delinquency petition against R.A.V., alleging that he, together with others, committed assault under state statute (Count I) and city ordinance (Count II)[2]. (J.A. 2). R.A.V. appeared in court on that day, denied the petition, and was held in custody.

On July 5, 1990, the state dismissed the charge of assault (Count II) under the city ordinance and substituted a new charge alleging petitioner committed the offense of disorderly conduct (bias-motivated, misdemeanor) pursuant to St. Paul City Ordinance section 292.02 (J.A. 8, 10).[3] Petitioner requested a hearing to challenge the constitutionality of this ordinance. The parties briefed and argued the issue before the Ramsey County District Court on July 13, 1990. (J.A. 13-27). In its brief and at argument, the state conceded that the ordinance proscribed expressive conduct. (J.A. 22); (App. C-1).[4] On July 16, 1990, the district court judge held that St. Paul City Ordinance section 292.02 was unconstitutional. (J.A. 32).

The state appealed this decision, (J.A. 36), and filed a Petition for Accelerated Review by the Minnesota Supreme Court. (J.A. 40). The Minnesota Supreme Court granted this Petition for Accelerated Review on August 3,

---

[2] The petition alleged that R.A.V. committed the offenses of Count I assault in the fourth degree (bias-motivated, gross misdemeanor) pursuant to state statute and Count II assault (bias-motivated, misdemeanor) pursuant to St. Paul city ordinance. (J.A. 2).

[3] Count I of the amended petition again listed violation of the state assault statute, Minnesota Statutes section 609.2231(4) which is punishable by up to one year in jail and/or a $3000.00 fine. This charge was not challenged and is still pending against petitioner. The trial has not been held.

[4] "App. C" refers to Appendix C, Brief for Petitioner.

1990. (J.A. 43). The parties argued the case before the Minnesota Supreme Court on December 4, 1990. On January 18, 1991, the Minnesota Supreme Court reversed the decision of the district court. (J.A. 44-52). The Minnesota Supreme Court held that although the ordinance was overbroad, it was not unconstitutional because it could be narrowly interpreted to prohibit only fighting words and imminent lawless action, expressive conduct outside the protection of the First Amendment. (J.A. 49-50).

SUMMARY OF ARGUMENT

> Roper: So now you'd give the Devil benefit of law!
>
> Thomas More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that!
>
> Thomas More: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, the laws all being flat? . . . [I]f you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Bolt, *A Man For All Seasons* 37, 38 (1960).

In an effort to legislate social tolerance, the City of Saint Paul passed a broad and sweeping ordinance prohibiting a wide range of intolerant expression. Petitioner, charged with delinquency for allegedly aiding others in

placing a burning cross in a black family's yard, challenges the constitutionality of the ordinance.

A. St. Paul City Ordinance section 292.02 prohibits symbolic expression ("symbol, object") and written expression ("characterization or graffiti") that offends others on the basis of "race, color, creed, religion or gender." By focusing on the direct impact of the expression on its audience ("arouses anger, alarm or resentment"), the ordinance punishes expression based on its content. Having addressed the content of the message, the ordinance goes on to impermissibly discriminate on the basis of viewpoint by specifically prohibiting the display of certain symbols ("a burning cross or Nazi swastika"). Finally, the parameters of the ordinance are unlimited, including within its purview all forums ("on public or private property").

From the beginning, the government has conceded that the ordinance addresses expressive conduct. (J.A. 22); (App. C-1). Since the ordinance proscribes that expression in a content-based fashion, it must be subjected to strict scrutiny. In order to withstand such scrutiny, the ordinance must be supported by a compelling state interest and the law must be narrowly tailored to achieve that interest.

Section 292.02 is neither supported by a compelling interest nor narrowly tailored to meet such an interest. The City of St. Paul has no legitimate objective in regulating politically unpopular or upsetting expressive conduct. To the extent such expression merely causes discomfort or is unsettling to its audience, it is fully protected by the First Amendment. Where the expression

involves illegal conduct, general penal laws directly address and punish such activity. Even assuming the City has demonstrated a compelling state interest, the ordinance is not narrowly drawn to achieve that interest. Instead, the sweeping ambit of the ordinance precludes a wide range of constitutionally protected expression.

B. The Minnesota Supreme Court tried to narrow this substantially overbroad law by limiting its application to "fighting words" or "imminent lawless action". Such a construction leaves intact many of the overbroad features of the ordinance and exchanges vagueness or functional overbreadth for the little overbreadth that it eliminates. The language and meaning of the ordinance is simply not subject to a narrowing construction. Such a construction would create a new law which effectively makes illegal that activity that the First Amendment does not protect. The ordinance has no core of constitutionally proscribable conduct since it is not possible to define a precise category of expression protected by the First Amendment which can be clearly stated to fall outside the reach of this narrowly construed ordinance. It is thus left to the discretion of law enforcement officials, prosecutors, and judges, to determine when an offensive expression has become unprotected as an instance of "fighting words". Narrowly construed, the ordinance continues to have a significant chilling effect on protected speech and expression.

The First Amendment protects unpleasant and unpopular expression, including expression which the majority of citizens may consider intolerant. If such expression goes unprotected, the "legislatures, courts, or dominant political or community groups," would become

the arbiters of what ideas are acceptable and may be expressed. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). This Court has held that the First Amendment protects expression which reflects unpopular minority opinion. The City of St. Paul undeniably transgresses constitutional boundaries when it seeks to regulate expression premised solely on the majority's view of the political acceptability of the expression. With no core of constitutionally proscribable conduct, this ordinance does not fall within any exception to the freedom of speech clause of the First Amendment. St. Paul City Ordinance section 292.02 should be declared unconstitutional by this Court.

ARGUMENT

I.

ST. PAUL CITY ORDINANCE SECTION 292.02 IS SUBSTANTIALLY OVERBROAD ON ITS FACE IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

As a broadly drafted law regulating speech and expression, section 292.02 is subject to a constitutional challenge as written even though a more narrowly drawn statute would be valid as applied to the conduct of the person before the Court. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Further, the overbreadth of this ordinance is "not only . . . real, but substantial." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The likelihood of impermissible application of the ordinance is great and, as the chilling effect on conduct is also significant, petitioner challenges section 292.02 on its face. In doing so, he also

asserts his right to be judged in accordance with a constitutionally sound law. Monaghan, *Overbreadth*, 1981 S.Ct. Rev. 1, 37.

When any overbroad law attempts to regulate expression on the basis of its content, it is subject to strict constitutional scrutiny. The government must demonstrate a compelling state interest and show that the law was narrowly tailored to achieve that legitimate goal. *Boos v. Barry*, 485 U.S. 312, 321 (1988). St. Paul City Ordinance section 292.02 reaches substantial areas of protected speech and expression. In doing so, it does not serve any compelling state interest and is not narrowly drawn to reach only those areas of expressive conduct that may be legitimately regulated by the government. The primary effect of this ordinance is to restrict protected expression in an overbroad manner.

A. The Ordinance Seeks To Regulate Protected Expressive Conduct, Including Symbolic And Written Speech, On The Basis Of The Content Of The Expression.

"Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

From the beginning of this case, the government has conceded that the expressive conduct proscribed by this ordinance possesses sufficient communicative elements to fall within the parameters of the First Amendment. (J.A. 22); (App. C-1). The ordinance clearly addresses expression that attempts to "convey a particularized message," and such expression likely "would be understood by

those who viewed it". *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Consequently, the government: "[C]annot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is expressive, as it is here." *Texas v. Johnson*, 491 U.S. 397, 416 (1989).

Thus the display of symbols has long been recognized as expressive conduct and this Court has held that laws which proscribe the display of symbols, precisely *because* of the message they convey, are unconstitutional. *See United States v. Eichman*, 496 U.S. ___, 110 S.Ct. 2404, 2409 (1990) (burning flag); *Spence v. Washington*, *supra* (defacing flag); *Schacht v. United States*, 398 U.S. 58 (1970) (military uniforms worn in presentation critical of American involvement in Viet Nam); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969) (anti-war black arm bands); *Stromberg v. California*, 283 U.S. 359 (1931) (displaying a red flag).

By its terms, section 292.02 regulates both symbolic conduct ("symbol, object, appellation") and written expression ("characterization or graffiti"). More significantly, this ordinance addresses the communicative impact of that expressive conduct. By including specific symbols (Nazi swastika, burning cross) the ordinance not only regulates the content of the message but is a "censorial statute" directed at particular groups and viewpoints. *Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973); *Cf. Keyishian v. Board of Regents*, 385 U.S. 589 (1967). The ordinance compounds its impermissible reach not only by addressing the content of the expression but by censoring

expression associated with unpopular minorities. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). By focusing on the content and viewpoint of the offensive expression, the ordinance attempts impermissibly to protect and shield its audience. "[A]ny attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Id.* at 797.

In *Boos v. Barry*, 485 U.S. 312 (1988), this Court subjected, to the most exacting scrutiny, a content-based restriction on political speech in a public forum. Striking down the first part of that law containing a "display" clause prohibiting signs with political messages, the Court noted that the clause "operates at the core of the First Amendment by prohibiting (picketers) from engaging in classically political speech". *Id.* at 318. The stated interest in that case, the need to protect "the dignity of foreign diplomatic personnel" by shielding them from the display of signs with insulting messages, *id.* at 322, was rejected as an impermissible attempt to protect an audience. The Court stated:

> As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment . . . [A] 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with our long standing refusal to (punish speech) because the speech in question

> may have an adverse emotional impact on the audience.

Id. at 322; *Cf. Hustler v. Falwell*, 485 U.S. 46, 55-56 (1988).

The Court further rejected the contention that the real concern of the display clause was not the suppression of speech but rather the "secondary effect" of shielding diplomats from speech that offended their "dignity." *Boos v. Barry*, 485 U.S. at 320-321. In citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the Court made it clear that "secondary effects":

> refer[s] to secondary features that happen to be associated with a particular type of speech that have nothing to do with its content, whereas, here, the asserted justification for the display clause focuses only on the content of picket signs and their primary and direct emotive impact on the audience.

Id. at 320.

The triggering language of St. Paul City Ordinance section 292.02, "arouses anger, alarm or resentment," could be used to describe the feelings of any audience when ridiculed outrageously, politically criticized in an undignified manner, or exposed to other forms of personally offensive expression. An "offensiveness" standard is as inherently subjective as a "dignity" standard or an "outrageousness" standard. St. Paul City Ordinance section 292.02 focuses directly on the content of the symbols and characterizations it prohibits and on the direct emotive impact of the expressive conduct.

B. There Is No Compelling State Interest Served By This Law And The Ordinance Is Not Narrowly Drawn To Achieve Any Legitimate Interest.

"For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are express." *NAACP v. Button*, 371 U.S. 415, 445 (1963).

When, as here, a government regulation is directed at and infringes upon constitutionally protected areas, including content-based expression, the government must demonstrate that a compelling state interest is furthered by the regulation. *Boos v. Barry*, 485 U.S. 312, 321 (1988). In this case, the government has failed to satisfy this burden.

The Minnesota Supreme Court implicitly acknowledged that the ordinance was content-based by noting in support of its decision the "compelling governmental interest in protecting the community against bias-motivated threats to public safety and order," citing *Village of Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620, 637 (1980), as authority for this conclusion. *In re R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991); (J.A. 51).[5] However, in finding the law unconstitutionally overbroad, this Court's decision in *Schaumburg* does not support the state court's conclusion. *Id.* at 637. Although this Court recognized a legitimate state interest in regulating door-to-door solicitations, it also found that the interest was only

[5] The government has likewise advanced only public safety concerns as the interest of the ordinance. (J.A. 25).

"peripherally promoted" by the regulation before it. *Id.* at 636. More significantly, this Court found that the village's interest could be served by "measures less intrusive" of First Amendment interests, stating that penal laws existed which could directly punish the fraudulent misrepresentations which concerned the state. *Id.* at 636-37.

The government has not articulated any other legitimate interest to be served by the ordinance. The references of the Minnesota Supreme Court to "protecting the community" against "bias-motivated threats," reflect the general governmental concern in maintaining public safety and order. As in *Schaumburg*, general penal laws are available to punish any conduct and expression that is properly subject to regulation.

Petitioner was also charged with delinquency on the basis that his conduct constituted an assault, in violation of Minnesota Statutes section 609.2231(4).[6] The petitioner still awaits trial on that allegation. The law prohibiting terroristic threats[7] may be applicable in characterizing or defining the alleged conduct in this case. Other general statutes, which also may be used to regulate similar criminal conduct include: trespass, Minnesota Statutes section

[6] An "assault" is defined by statute as "(1) An act done with intent to cause fear in another of immediate bodily harm or death; or (2) The intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02(10).

[7] Minn. Stat. § 609.713(1) provides: "Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in reckless disregard of causing such terror . . . may be sentenced to imprisonment for not more than five years."

609.605(1)(b)(7) (enhancement provided for bias-motivated offenses); disorderly conduct, Minnesota Statutes section 609.72(1); interference with privacy, Minnesota Statutes section 609.746(2); and criminal damage to property, Minnesota Statutes section 609.595.[8] Since existing general criminal laws satisfy the state's interest in maintaining order, this ordinance is unnecessary to further this interest.

Section 292.02 should be scrutinized under the same analysis this Court used in *Schaumburg*: "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation is the touchstone. . . ." *Id.* at 637 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

It would appear that the real interest advanced by the ordinance is that of increasing social tolerance by prohibiting intolerant expressions regarding race, color, creed, religion, and gender. While the government may have an interest in increasing understanding among its citizens, it may not promote this interest by regulating individual opinion and expression. Government may not seek to control individual expression as a means of encouraging certain viewpoints, including racial and religious tolerance, even if such viewpoints are widely held. The notion of a "consensus" is irrelevant to the protections of the First Amendment or to any government regulation of expression. "[T]he Government may not prohibit the expression of an idea simply because society finds the

---

[8] Minnesota law also permits an individual who is subjected to harassment to obtain a restraining order, the violation of which is a misdemeanor. Minn. Stat. § 609.748.

idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. ___, 110 S.Ct. 2404, 2406 (1990).

Assuming *arguendo* that there is some legitimate state interest which would permit the prohibition of speech and expression which "arouses anger, alarm or resentment in others," St. Paul City Ordinance section 292.02, was not narrowly tailored to achieve even that goal. *Boos v. Barry*, 485 U.S. 312, 329 (1988).[9] "It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications, Inc., v. FCC*, 492 U.S. 115, 126 (1989). The language of the ordinance itself makes clear the government's failure to tailor the legislation to achieve any compelling interest.

1. *"Whoever places on public or private property. . . ."* St. Paul City Ordinance section 292.02.

The ordinance as written is applicable to *all* areas of the city. The ordinance, therefore, enjoins expression in traditional public forums, designated public forums, a citizen's private property, and private property of another with consent. *See, e.g., Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45, 46 (1983); *United States v. Grace*, 461 U.S. 171, 177-78 (1983). The wholesale inclusion of all such protected forums demonstrates the substantial overbreadth of this portion of the ordinance. The remaining location to which the ordinance could

---

[9] *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960): "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

apply, private property without the owner's consent, is already precluded by existing penal laws without regard to the content of the expression.

> 2. *"[S]ymbol, object, appellation, characterization, or graffiti, including but not limited to a burning cross or Nazi swastika. . . . "* St. Paul City Ordinance section 292.02.

The sweeping language of the ordinance regarding types of prohibited expression also shows that it is viewpoint-based. The methods of expression prohibited can be classified as follows: (a) symbolic conduct – "symbol, object, appellation" and (b) written expression – "characterization or graffiti." This language demonstrates the substantial overbreadth of forbidden expression and again illustrates the government's comprehensive approach.

The language of the ordinance prohibits specific symbols including, at a minimum, "a burning cross or Nazi swastika." These two symbols communicate definite, though unpopular, political viewpoints.[10] Over twenty years ago, this Court reversed a criminal conviction, for advocacy of violence as a means of reform, based in part on a film showing the burning of a cross. *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969). Since this decision, lower courts have struck down laws regulating the display of symbols, including Nazi swastikas. *See Collin v. Smith*, 578 F.2d 1197 (7 Cir.), *cert. denied*, 439 U.S. 916 (1978); *see also*

---

[10] "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943).

Knights of Ku Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn, 1990).

The ordinance conceivably prohibits such written expression as drawings, cartoons, depictions, or pictures. Addressing these types of "characterizations," this Court recently acknowledged the application of First Amendment protections to such expression: "[G]raphic depictions and satirical cartoons have played a prominent role in public and political debate. . . . From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them." *Hustler Magazine v. Falwell*, 485 U.S. 46, 54-55 (1988).

This Court has repeatedly emphasized that the idea that government may regulate expression on the basis that it offends certain groups is repugnant to the First Amendment. *See, e.g., United States v. Eichman, supra* at 2406; *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Street v. New York*, 394 U.S. 576, 592 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). To allow an audience to determine what expression is permitted, based on its agreement or disagreement with the content of the message, would provide a "heckler's veto" to the expression of an opposing viewpoint. *See, e.g., Cohen v. California;* 403 U.S. 15, 23 (1971). Unpopular ideas, such as separation of the races, racial supremacy, and religious, ethnic, or gender based intolerance as reflected by symbolic expression and written speech cannot be restricted in the overly broad manner of section 292.02.

> 3. *"[W]hich one knows or has reasonable grounds to know arouses anger, alarm or resentment in*

others. . . . " St. Paul City Ordinance section 292.02.

This language reflects the central purpose of the ordinance: to prohibit expression which offends, angers, or disturbs others. It is only this type of audience reaction that precipitates application of the ordinance. This Court, however, has repeatedly noted that expression which is "provocative and challenging," has "profound unsettling effects," and "invites dispute, induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" is among the "high purposes" of the First Amendment. *Terminiello v. Chicago, supra* at 3-4; *See also United States v. Eichman, supra* at 2406; *Street v. New York, supra* at 591. Expression which the ordinance would prohibit is indistinguishable from that expression protected by the First Amendment.

4. *"[O]n the basis of race, color, creed, religion or gender. . . . "* St. Paul City Ordinance section 292.02.

The number of groups designated for protection by the ordinance is indicative of the government's approach. By specifying two hate symbols, the ordinance appears to be aimed primarily at protecting African Americans and Jewish Americans from intolerance. The ordinance clearly could be applied to other named groups. A cross may be equally disturbing to and resented by non-Christians and atheists. Particular treatment of a cross, or another religious symbol, may be troubling to followers of other religions. The Star of David may be seen as a Zionist symbol and so offend or threaten Arab and Palestinian Americans. Many different symbols or characterizations may conceivably disturb or anger Native Americans,

Asian Americans, Hispanic Americans, and other Americans proud of their ethnic heritage.[11]

Since "creed" is addressed in the ordinance in addition to religion, this portion of the ordinance could apply to any "statement of belief."[12] Citizens of a southern state or with a southern heritage could argue that the display of a confederate flag reflects their regional pride. Under the ordinance, this belief could be subordinated to the feelings of an African American who may view the confederate flag as a continuing symbol of racism. Since the ordinance does not require a showing of explicit intent, the violation of this law will always depend on the subjective response of the public.

The government amended this ordinance in 1990 to add "gender" to the list of protected groups who may be offended by the display of symbols or expressions. This amendment reflects an inherent problem with this type of law: it is always subject to the changing political climate of the community and the consensus of the majority regarding acceptable expressive conduct. Left unchecked,

---

[11] One commentator refers to the "balkanization" among groups in the university context: "[S]tudents from different backgrounds came to college thinking of themselves as 'individuals' or 'Americans' but, once at Berkeley, began to think of themselves as 'African American, Asian American or whatever.' [E]ach group accuses other groups of being closed and not receptive" and "each group complains about being stereotyped." D'Souza, *The Illiberal Education* 46, 47 (1991).

[12] "Creed n . . . 2 any statement of belief, principles, etc." *Webster's New World Dictionary* 148 (1987).

law-making bodies will continue to court political support by enlarging the list of protected groups while precluding unpopular minority expression.[13]

The classification of "gender" as one of the protected subgroups substantially increases both the overbreadth of the ordinance and the chilling effect on expressive conduct. The ordinance could conceivably be applied against a pro-choice advocate for the display of a clothes hanger as well as against a pro-life advocate for the display of a picture of a fetus. Since the ordinance covers all forums and bans many types of expressive conduct, it could serve to inhibit virtually any peaceful demonstration regarding many of the issues that define us as a pluralistic society.

In attempting to silence certain expression, this ordinance indirectly represses thoughts and ideas as well. The dangerous result of such laws or codes, whether in the City of St. Paul or on college campuses, is the "pall of orthodoxy" that is cast over the community.[14] As one federal judge, comparing today's climate to the McCarthy era of the 1950s, recently wrote in a letter to the Dartmouth Club:

> The senator from Wisconsin sought to disarm his opponents by calling them communist or

[13] The current experience with university speech and conduct codes also has led to expanding prohibitions on offensive expression, "on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. . . ." *Doe v. University of Mich.*, 721 F.Supp. 852, 856 (E.D. Mich. 1989).

[14] *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

> communist sympathizers – and thereby robbed them of moral legitimacy. The Dartmouth Administration and many of the faculty use "racism" and "sexism" and other "isms" loosely in the same fashion to label their critics as morally inferior. I find both approaches equally offensive. . . .

Silberman, "A Letter to the Dartmouth Club," *1990 First Amendment Law Handbook* 146 (1990).

St. Paul City Ordinance section 292.02 reflects an effort by the government to suppress expressive conduct in a sweeping and substantially overbroad manner. The unambiguous purpose of the ordinance is to ban symbolic and written expression when the majority finds it offensive or demeaning. In an effort to legislate civility, the government has implicated a wide area of expressive conduct that it may not constitutionally regulate. The government's interest in maintaining safety and order is satisfied by existing general criminal laws. The ordinance is not narrowly tailored to meet any other legitimate state interest.

II.

ST. PAUL CITY ORDINANCE SECTION 292.02 CANNOT BE NARROWLY CONSTRUED WITHOUT CONTINUING TO VIOLATE OVERBREADTH AND VAGUENESS PRINCIPLES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The language of St. Paul City Ordinance section 292.02 is "plain" and its meaning "unambiguous" in its application to protected expression and speech. As a result, it is not susceptible to a limiting construction. Any attempt to limit the ordinance to "fighting words" or

"imminent lawless action" would not cure any of its constitutional infirmities and would result in an unconstitutionally vague law. Moreover, a narrowing interpretation fails because it is impossible to give the ordinance effect without imposing unconstitutional content-based restrictions on expression.

There are no exceptions to the First Amendment which permit a government to regulate expressive conduct in this manner. No new exceptions should be created in an academic attempt to legislate social tolerance. Making intolerant expression illegal will not increase understanding; it will only vitiate the First Amendment guarantee of free speech that has protected our cultural diversity. This Court should follow established First Amendment analysis and not create a new category of prohibited expressive communication.

A. The Ordinance Is Not Susceptible To A Narrowing Construction Because It Has No Core Of Easily Identifiable And Constitutionally Proscribable Conduct Which Falls Outside The Protection Of The First Amendment.

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Kolender v. Lawson*, 416 U.S. 352, 355 (1983); *Cf. Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5 (1982). However, "the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements". *Virginia v. American Bookseller's Association*, 484 U.S. 383, 397 (1988). When faced with an ordinance which by its

plain terms was not easily susceptible to a narrowing construction, this Court held that the ordinance was invalid. *Erznoznik v. City of Jacksonville*, 442 U.S. 205, 216 (1975). Noting that the possibility of a limiting construction appeared "remote", the Court refused to apply a narrowing construction even when one appeared available "because the rewriting of the ordinance would be necessary to reach that result". *Id.* at 216 n.15. In that case the Court acknowledged that the city involved may even have had a legitimate interest in passing an ordinance which regulated movies on the basis of their content, but stated that the ordinance, "did not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Id.* at 217-18.

This Court has not hesitated to invalidate other laws that were substantially overbroad, inhibiting wide areas of expressive conduct and providing little foundation for narrow construction. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). These cases and others illustrate how a narrowing construction of section 292.02 ultimately fails.

In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the commission argued that a regulation it had enacted banning all First Amendment activities within a certain section of the airport was permissible because it addressed its regulation evenly to the public and had only a general application that could be narrowly construed on a case-by-case basis. This Court

rejected that argument and held that no conceivable governmental interest could justify such an absolute prohibition of speech:

> The resolution therefore does not merely reach the activity of respondents at L.A.X.; it prohibits even . . . the wearing of campaign buttons or symbolic clothing . . . [I]t is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable.

Board of Airport Commissioners of City. v. Jews for Jesus, Inc., 482 U.S. at 574-76.

The Court noted that any limiting construction would still result in a substantial chilling effect because airport officials would retain the power to decide whether any given activity violated the regulation. *Id.* at 576.[15]

St. Paul City Ordinance section 292.02 cannot be limited by any narrowing construction, for such a construction is of little usefulness in reducing the overbreadth of the ordinance. Symbols and characterizations can be expressed in a multitude of ways other than on t-shirts and buttons as cited in *Board of Airport Commissioners v.*

---

[15] "Such a limiting construction, however, is of little assistance in substantially reducing the overbreadth of the resolution. Much non-disruptive speech – such as the wearing of a t-shirt or button that contains a political message . . . [i]s still protected speech even in a non-public forum." *Board of Airport Commissioners v. Jews for Jesus, Inc., id.* at 576 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

Jews for Jesus, Inc. Methods of expression conceivably could include other forms of clothing including athletic caps or jackets, car bumper stickers, pickets and even political campaign signs. To ascertain which form of expressive conduct is permissible and which rises to the level of "fighting words" makes a case-by-case adjudication intolerable. This ordinance would continue to chill expression throughout the City of St. Paul. Like the statute in *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 948, section 292.92 "operates on a fundamentally mistaken premise," here, that viewpoint-based laws are a permissible method of promoting social tolerance. As a result, the ordinance is not unconstitutional in part but rather it is inherently flawed.

The Minnesota Supreme Court tried to cure the overbreadth of section 292.02 by finding it could be narrowly interpreted to prohibit only expressive conduct which "falls outside First Amendment protection". (J.A. 44).[16] In so holding, the court attempted to narrowly construe a substantially overbroad law which does not permit such a construction. As construed by the court, the ordinance is vague or functionally overbroad and the chilling effect on protected expressive conduct remains.[17]

---

[16] "[S]tatutes narrowed merely by an assertion that they reach only as far as the Constitution permits, without citation of more specific limitations, remain functionally overbroad." Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 907 (1991).

[17] "[F]irst Amendment overbreadth and vagueness doctrine have common rationales . . . First Amendment vagueness

(Continued on following page)

Similarly, in *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court addressed an ordinance of substantial overbreadth; its literal wording prohibited a significant range of protected speech. The City of Houston defended the wide sweep of its ordinance by arguing that it was essential to the maintenance of public order. *Id.* at 459. The Court rejected this argument and held that the ordinance was susceptible to regular application to protected expression and that it was not susceptible to a limiting construction because its language was plain and its meaning unambiguous. "The enforceable portion of this ordinance is a general prohibition of speech that 'simply has no core' of constitutionally unprotected expression to which it might be limited." *Id.* at 468.

St. Paul City Ordinance section 292.02 openly prohibits any expressive conduct whether symbolic or written that could disturb various groups for any reason at any time and at any place within the city limits. The ordinance is not readily susceptible to a limiting construction and it does not address any core of easily identifiable and constitutionally proscribable expression. *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984).

(Continued from previous page)

doctrine – as distinct from ordinary or non-First Amendment vagueness doctrine – is best conceptualized as a subpart of First Amendment overbreadth doctrine." Fallon, *id.* at 904. Fallon refers to this vagueness as "functional overbreadth" *Id.* at 907.

B. The Ordinance Cannot Be Narrowed To Fit Established Exceptions To The First Amendment Without Continuing To Have A Significant Chilling Effect On Protected Expression.

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the court to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

Kolender v. Lawson, 461 U.S. 352, 358 n. 8 (1982); *Cf. United States v. Reese*, 92 U.S. 214, 221 (1876).

This Court originally set forth the "fighting words" doctrine in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The doctrine has been interpreted as a very narrow exception to the First Amendment freedom of speech clause for "words likely to cause an average addressee to fight." *Id.* at 573. Since *Chaplinsky*, this Court has consistently limited the "fighting words" doctrine,[18] holding that offensive language can be statutorily prohibited only if it is extremely personally offensive, *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973), uttered in a face-to-face manner, *Lewis v. New Orleans*, 408 U.S. 913 (1972) (Powell, J. concurring), to a specific individual not to a group, *Gooding v. Wilson*, 405 U.S. 518 (1972), and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response in a reasonable

---

[18] "[T]he court has overturned every single fighting words conviction that it has reviewed since *Chaplinsky*." Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 Duke L.J. 484, 510 (1990).

person to whom the remarks were made. *Id.* All of these elements must be present before the fighting words exception may be considered. *See* Gard, *Fighting Words and Free Speech*, 58 Wash. U.L.Q. 531, 536-37 (1980).

This Court has acknowledged that "one man's vulgarity is another's lyric" and has indicated that those who would restrict speech that seems profane or upsetting carry a heavy burden. *Cohen v. California*, 403 U.S. 15, 25 (1971). It is not enough that there be a possible tendency for certain speech to provoke violent reaction, there must be an immediate threat of violence. *See, e.g., Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974). Commentators have observed that abusive epithets do not often result in reflexive violence.[19] The likelihood of an immediate breach of the peace is even more remote when the expression is symbolic or written. Consequently, not even the asserted governmental interest in keeping the peace or in maintaining order would appear furthered by the "fighting words" exception.

A distinction should be made between expressions of dislike or disrespect for another that brings forth an essentially ideological response, angry or not, and that inherently provocative speech that results in reflexive violence.[20] The first type of expression may even result in some type of reaction but the outrage of the recipient at the content of the message cannot be allowed to censor the expression. "[U]nder our Constitution the public expression of ideas may not be prohibited merely because

---

[19] *See, e.g.*, Gard, *supra* at 580.

[20] *See, e.g.*, Gard, *supra* at 540.

the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). The government may not penalize expression because it disagrees with the ideological message conveyed. *Schacht v. United States*, 398 U.S. 58 (1970).

This Court has also noted that under certain limited circumstances advocacy likely to provoke "imminent lawless action" may be regulated. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case this exception was restricted to laws involving expression directed to as well as likely to incite imminent lawless action. *Id.* at 447-48. Those laws not limited in scope to this type of incitement have been struck down. *See NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974). Even where angry speech was later followed by violence, this Court nonetheless held that the speech "did not transcend the bounds of protected speech set forth in *Brandenburg*." *NAACP v. Clairborne Hardware Co., supra* at 928. It is also not enough that one advocate violence in the abstract. *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam).

Neither the "fighting words" exception nor the "imminent lawless action" exception clarify the permissible reach of section 292.02. By its very nature, symbolic and written expression may stir some to anger by reason of its content. Yet, narrowing the ordinance to reach "fighting words" or "imminent lawless action" is ineffective due to the breadth of the language used in drafting the ordinance. Thus, narrowing the "arouses anger, alarm or resentment in others" clause leaves intact the overbreadth of the remaining terms. To the degree the narrowing construction attempts to limit the impact of the

ordinance on protected expression, it fails in its objective. Those expressions which rise to the level of "fighting words" or "imminent lawless action" as narrowly interpreted by the decisions of this Court constitute only a small portion of expression addressed by this ordinance. Any reduction in the chilling effect of the ordinance is equally negligible. The First Amendment will not permit such a violation of traditionally protected areas by a regulation of such questionable utility.

To construe this ordinance narrowly, as applying to only those areas unprotected by the First Amendment, results in an additional problem of constitutional dimension, for persons "of common intelligence must necessarily guess at its meaning." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The ordinance fails to provide any certainty in guiding citizens in their conduct or police in their enforcement of the law. "[T]he more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Cf. Smith v. Goguen*, 415 U.S. 566, 574 (1974). *See* Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 904 (1991).

The vagueness of the narrowly construed ordinance is similar to the vagueness of a law which merely states that "non-First Amendment expression is prohibited." No guidance is provided regarding the boundary between permissible and impermissible expression. No narrowing construction is possible because there is no precise

category of protected expression which can be clearly delineated from the permissible reach of the ordinance.[21] Selective or arbitrary enforcement of this law would be based on the political persuasion of those in power. It is likely that such a substantially overbroad ordinance would be violated frequently since section 292.02 proscribes so much expressive conduct. It is this potential for violation, not the likelihood of prosecution, which must be addressed.[22] The failure or success of such prosecutions is also irrelevant. "So long as the statute remains available to the state the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of the ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). Expression, whether, written, or symbolic, will be chilled, as various viewpoints remain subject to prosecution if they differ from views of the majority.[23]

---

[21] "[A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application . . . [T]his course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty." *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964).

[22] "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and overbroad statute lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, at 435.

[23] "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in Court that he spoke out of hatred; even if he did speak out of hatred,

(Continued on following page)

The proponents for regulating expression in the manner of St. Paul City Ordinance section 292.02 may find that they too will suffer from its sweeping parameters. The broad range of objectionable expressions combined with the increasing number of protected groups could lead to a general climate of repressed expression. An unanticipated result may be enforcement against the very groups targeted for protection.[24] The direction of the winds of political acceptability may change and such laws could be used to reduce their freedom of expression. Forcing intolerant opinions and ideas underground may result in the glorification of racist, sexist, or anti-semitic activity.[25] As a lawyer who defended the First Amendment right of the American Nazi Party to march in Skokie, Illinois, (*Collin v. Smith*) stated:

(Continued from previous page)

utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth". *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

[24] "Thus, the record of the actual implementation of the fighting words doctrine demonstrates that . . . such a speech restriction will be applied discriminatorily and disproportionately against the very minority group members whom it is intended to protect." *Strossen, supra* at 512.

[25] "The efforts of the administration at Michigan and other schools to regulate and enforce a social etiquette have created an enormous artificiality of discourse among peers, and thus have become an obstacle to that true openness that seems to be the only sure footing for equality. For when sentiments are outlawed, they tend to go beneath the surface . . . [t]he consequence of such policies, therefore, is to promote rebellion in the name of harmony, to exacerbate bigotry while claiming to fight it. . . . " D'Souza, *The Illiberal Education* 156 (1991).

> Why did the Nazi message fall on such deaf ears? Revolutionaries and advocates of destruction attract followers readily when the society they wish to overturn loses legitimacy. Understanding this process, revolutionaries try to provoke the government into using repressive measures. They rejoice, as the American Nazis did, when their rights are denied to them; they count on repression to win them sympathizers.[26]

C. This Court Should Not Create Any New Exceptions To The First Amendment Protection Of Free Speech.

Recognizing the difficulty in applying the "fighting words" and "imminent lawless action" exceptions to offensive or intolerant expression, some proponents of regulation have suggested new methods of encroaching upon the freedom of speech clause. One commentator would divide the population into "dominant group" status and "subordinated group" status. If a subordinated group member were a target of the "rhetoric of racial inferiority" such speech would be prohibited outright.[27] Another commentator would prohibit hate speech on the basis of the "psychic harm" dictum found in *Chaplinsky v. New Hampshire, supra* at 572.[28] This Court, however, has never relied upon *Chaplinsky's* "psychic harm" dictum to

---

[26] Neier, *Defending My Enemy: American Nazis, The Skokie Case, And The Risks Of Freedom* 170-71 (1979).

[27] Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L.R., 2320, 2355-56, 2361-64 (1989).

[28] Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech On Campuses*, 1990 Duke L.J. 431, 462 (1990).

sustain a fighting words conviction. In fact, since *Chaplinsky*, this Court has upheld a number of cases protecting speech that was allegedly offensive and could theoretically have caused psychic injury.[29]

Laws similar to section 292.02 have been enacted throughout the nation in an attempt to counter "hate speech". Consequently, the ordinance mirrors many speech and conduct codes in both public and private universities across the nation. Such codes and conduct regulations are proliferating. According to a survey by the Carnegie Foundation for the Advancement of Teaching, over sixty percent of the responding colleges and universities had developed or were developing written policies on bigotry, racial harassment or sexual harassment on campus. Of the remaining schools, eleven percent were working to establish similar restrictions on written, spoken, and symbolic speech. *A Special Report: Campus Life in Search of Community* (Princeton University Press 1990 at 19, 122, 138). Contrary to this trend, a bill was recently introduced in Congress that seeks to extend First Amendment guarantees of freedom of speech to private schools and universities.[30]

---

[29] Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 Duke L.J. 484, 514 (1990) (citing *United States v. Eichman, supra, Hustler Magazine v. Falwell, supra, Spence v. Washington, supra, Cohen v. California, supra, Street v. New York, supra,* and *Terminiello v. Chicago, supra).*

[30] H.R. 1380 Collegiate Speech Protection Act of 1991 seeking to amend Title VI of the Civil Rights Act of 1964 introduced by Representative Hyde on March 12, 1991.

A university campus is a virtual microcosm of a community such as the City of St. Paul. Just as St. Paul has both public and private forums, the university campus contains within its boundaries a mall, classrooms, and areas of residence. Whether it be within the limits of the City of St. Paul or on a campus elsewhere in the nation, substantially overbroad laws or regulations which suppress expressive conduct on the basis of viewpoint obscure our goal of a tolerant pluralistic society.[31]

Any expansion of narrowly recognized exceptions to the First Amendment would further diffuse the nearly indistinguishable line between permissible and proscribable expression. Further restrictions might curtail some offensive expression but only at the cost of chilling a great deal of protected speech. The result may well be the silencing of political debate, the encouraging of orthodoxy, and the endangering of the individual's right to dissent. To enforce a notion of civility to the point of forbidding unpopular minority expression is to underestimate the citizens of this country at the cost of our basic right of self-expression. This Court should not ignore the guidance of established First Amendment analysis and create a new category of expressive communication subject to regulation.

---

[31] "For speech that attacks and challenges community values, the act of toleration serves to both define and reaffirm those values; the act of tolerance implies a contrary belief and demonstrates a confidence and security in the correctness of the community norm. Through toleration in short, we create the community, define the values of that community, and affirm a commitment to and confidence in those values." Bollinger, *The Tolerant Society* 158 (1986).

CONCLUSION

The judgment of the Supreme Court of Minnesota upholding the constitutionality of St. Paul City Ordinance section 292.02 should be reversed and section 292.02 should be held unconstitutionally overbroad in violation of the First Amendment to the United States Constitution.

Respectfully submitted,

/s/ Edward J. Cleary
EDWARD J. CLEARY
Counsel of Record
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

/s/ Michael F. Cromett
MICHAEL F. CROMETT
Of Counsel
1708 American National
Bank Building
Saint Paul, NM 55101
(612) 227-5363

Counsel for Petitioner

APPENDIX A

List of Cases

The Minnesota Supreme Court and Court of Appeals have upheld the constitutionality of a variety of disorderly conduct statutes and ordinances, similar to the ordinance in this case, against challenges that the laws were overbroad.

City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980)

City of St. Paul v. Mulnix, 232 N.W.2d 206 (Minn. 1975)

In the Matter of the welfare of S.L.J., 263 N.W.2d 412 (Minn. 1978)

State v. Lynch, 392 N.W.2d 700 (Minn. App. 1988)

The guarantee of free speech protected by the First Amendment is not absolute. The United States Supreme Court has ruled that "fighting words" are *not* protected speech.

Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942)

The United States Supreme Court does not support review of a statute only on its face – constitutional analysis should be conducted in light of the specific facts of any case.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 86 L.Ed. 394, 105 S.Ct. 2794 (1985)

Appellate courts have upheld convictions for cross burning activities.

State v. Miller, 629 P. 2d 748, 6 Kan. App. 432 (1981)

U.S. v. Salyer, 893 F.2d 113 (6th Cir. 1989)

/s/ Leslie Norsted
Leslie Norsted
Asst. Ramsey County
Attny.

/s/ J. Lindsay Flint
J. Lindsay Flint
Asst. Ramsey County
Attny.

APPENDIX B

MEMO

TO: The Honorable Charles A. Flinn

FROM: Edward J. Cleary

DATE: July 10, 1990

RE: *State vs. R.A.V.*

ISSUE: Constitutionality of St. Paul City Ordinance Section 292.02

ST. PAUL CITY ORDINANCE SECTION
292.02 DISORDERLY CONDUCT

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion commits disorderly conduct and shall be guilty of a misdemeanor.

FIRST AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES
FREEDOM OF RELIGION, SPEECH AND PRESS;
PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE
STATE OF MINNESOTA
ARTICLE I, SECTION 3
LIBERTY OF THE PRESS

> The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

It is the position of Defendant R.A.V. that St. Paul City Ordinance Section 292.02 is unconstitutional based on the First Amendment to the United States Constitution and Article I, Section 3 of the Constitution of the State of Minnesota.

Specifically, Defendant R.A.V. contends that since this Ordinance may not be applied to criminalize certain conduct, it is substantially overbroad. Further, it is our position that the Ordinance is fatally vague as well because it turns in part on subjective reactions to prohibited conduct. *Collin vs. Smith*, 578 F.2d 1197, 1207 (1978); see also *Coetes vs. City of Cincinnati*, 402 U.S. 611 (1971).

ANALYSIS

First: *Does the conduct proscribed by the Ordinance constitute expressive conduct?*

In deciding whether the particular conduct possess sufficient communicative elements to bring the First Amendment into play, the question is whether "an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it" *Texas vs. Johnson,*

109 S.Ct. 2533, 2539 (1989). Clearly the conduct proscribed in Section 292.02 constitutes expressive conduct by such a measure. See, *Texas vs. Johnson, Supra.* Obviously the burning of a cross or the wearing of a Nazi swastika constitute expressive conduct. *Collin vs. Smith,* 578 F.2d 1197 (1978).

Second: *Does the State's regulation relate to the suppression of free expression (i.e. is it content-based)?*

Collin vs. Smith, Supra, indicates clearly that the wearing of Nazi armbands and the display of a Nazi party flag are entitled comprehensive protection under the First Amendment. That case involved the famous Skokie, Illinois, march by the Nazis in a Jewish suburb. The ordinance passed by the Village of Skokie attempted to prohibit behavior similar to that proscribed by Section 292.02. The Court therein noted that the Ordinance turned on the *content* of the demonstration. It further pointed out that an analysis of the content restrictions "must begin with a healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights." *Collin vs. Smith,* 578 F.2nd 1197 at 1202.

Since the Ordinance on its face depends on the likely communicative impact of expressive conduct, the restriction on expression is content based. Thus the political expressions restricted by the Ordinance, are restricted because of the content of the message conveyed. *Boos vs. Barry,* 108 S.Ct. 1157 (1988). As the Court notes in *Texas vs. Johnson, Supra,* at 2544:

> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply

> because society finds the idea itself offensive or disagreeable.

Section 292.02 thus is a *content-based* restriction on political speech or action in a public or private forum. As such it must be subjected to the most exacting scrutiny. The state must be required to show that "the regulation is necessary to serve a compelling state interest and that is clearly drawn to achieve that end." *Boos vs. Barry, Supra* at 1164. Since the State's regulation is related to the suppression of free expression, *United States vs. O'Brien,* 391 U.S. 367 (1968) is not applicable for it only relates to non-communicative conduct. Clearly conduct proscribed by Section 292.02 is *expressive.*

Third: *Since Section 292.02 is a content-based restriction on expressive conduct in a public forum, can the state show that the Ordinance is necessary to serve a compelling state interest and that is narrowly drawn to achieve that end?*

This Ordinance suffers from the same fundamental flaw as the Flag Protection Act of 1989 ruled unconstitutional in *U.S. vs. Eichman* (110 S.Ct. 2402) (1990). Since the restriction on expression in the Ordinance cannot be justified without reference to the content of the regulated speech, it must be subjected to the most exacting scrutiny as noted above. Here as in *Eichman, supra,* the Government's interest cannot justify its infringement on First Amendment Rights. The Supreme Court has indicated that in public debate "our own citizen must tolerate insulting, even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment". *Hustler Magazine, Inc. vs. Falwell,* 108 S.Ct. 876 (1988). As the Court notes in *Eichman, supra*:

> Any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment. While flag desecration, like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures, is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *U.S. vs. Eichman, supra,* at 2405. See also *Terminiello vs. Chicago* 69 S.Ct. 894 (1949).

Twice within the past year, the United States Supreme Court in *Texas vs. Johnson, supra* and *U.S. vs. Eichman, supra,* has been forced to reiterate the broad mandate of the First Amendment even in the context of flag burning. In both cases, the Court overturned the law in question because the law:

> Still suffers from the same fundamental flaw; it suppresses expression out of concern for its likely communicative impact. *U.S. vs. Eichman,* 110 S.Ct. 2404 at 2408.

CONCLUSION

Clearly St. Paul City Ordinance 292.02 proscribes expressive conduct. It is a content-based restriction on political speech or action in both public and private forums and is not necessary to serve a compelling state interest nor is it narrowly drawn to achieve any compelling state interest. It simply suppresses expression out of concern for its likely communicative impact which is clearly unconstitutional under United States Supreme Court decisions including the most recent *U.S. vs. Eichman,* 110 S.Ct. 2404 (1990). Because this ordinance may

not be applied to criminalize the conduct that it attempts to criminalize, and because it is susceptible to such an application, it clearly suffers from substantial over-breadth, and further the Ordinance is fatally vague as well because it turns in part on subjective reactions to prohibited conduct. Defendant R.A.V. respectfully asks the Court to find Section 292.02 of the St. Paul City Legislative Code unconstitutional.

Cases attached:

1) *U.S. vs. Eichman*, 110 S.Ct. 2404 (1990) – already provided to the Court.
2) *Texas vs. Johnson*, 109 S.Ct. 2533 (1989) – already provided to the Court.
3) *Collin vs. Smith*, 578 F.2d 1197 (1978).
4) *Boos vs. Barry*, 108 S.Ct. 1157 (1988).
5) *Hustler Magazine vs. Falwell*, 108 S.Ct. 876 (1988).
6) *KKK vs. Martin Luther King, Jr. Worshipers*, 735 F.Supp. 747 (1990).
7) *Brandenburg vs. Ohio*, 395 U.S. 444 (1968).
8) *Godward vs. City of Minneapolis* (Finance & Commerce, June 1, 1990).

APPENDIX C

(SEAL)

OFFICE OF THE COUNTY ATTORNEY
RAMSEY COUNTY
SUITE 400
350 ST. PETER STREET
ST. PAUL, MINNESOTA 55102

TOM FOLEY
COUNTY ATTORNEY

TELEPHONE (612) 298-4421
FAX 298-5316

MEMORANDUM

TO: The Honorable Charles A. Flinn, Jr.

FROM: J. Lindsay Flint
Leslie Norsted

DATE: July 13, 1990

RE: State v. R.A.V.

STATE'S ORAL ARGUMENT

Respondent argues that the St. Paul Ordinance in question here, § 292.02, bias-motivated disorderly conduct, attempts to regulate expressive conduct and is therefore within the scope of the First Amendment of the Constitution of the United States and Article I, Section 3 of the Minnesota State Constitution.

The State agrees that the Ordinance does indeed attempt to proscribe expressive conduct. The burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate.

Respondent contends that the Ordinance is substantially overbroad and vague. The Respondent is asking the Court to strike down the entire Ordinance on its face as being in violation of the First Amendment right to free speech.

The Court has held however, that where both conduct and speech are involved, the facial overbreadth of a statute must be both real and substantial, judged in relation to the statute's plainly legitimate sweep, to justify holding it to be void on its face. Statutes are invalid for overbreadth only when the flaw is of substantial concern in the context of the statute as a whole. (*Broadrick v. Oklahoma*, 413 U.S. 615, (1973). This was reiterated by the Court in *Brockett v. Spokane* (1985) when the Court held that a court should not extend it's invalidation of a statute further than necessary to dispose of the case before it. In *Brockett*, the Court held that a state moral nuisance statute, which was allegedly overbroad in that it's reference to material which incites "lust" reached constitutionally protected material should be invalidated only insofar as the word "lust" is to be understood as reaching protected material and not in its entirety. The lower court is to do so when such a limiting construction is feasible and does not invalidate the intent of those enacting the statute.

The Court goes on to cite what it calls two cardinal rules governing federal courts: 1) never anticipate a question of constitutional law in advance of the necessity of deciding it and 2) never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. (*U.S. v. Raines*).

Thus, the court today need only look at the Ordinance as it may be applied to the case before it. That case involves a cross-burning on private property and that alone. So the Court need only look at the Ordinance as it applies to the placing of a burning cross on private property where one knows or has reason to know it will arouse anger, alarm or resentment in others on the basis of race, color, creed or religion.

This disorderly conduct ordinance is very similar to other Minnesota disorderly conduct statutes and ordinances which have been upheld as Constitutional. The Minnesota Supreme Court has followed the rule of the U.S. Supreme Court as outlined in *Brockett*, *Broderick* and *Raines* to narrowly construe such disorderly conduct statutes. To quote the court in *State of Minnesota City of Minneapolis v. Lynch*, "Where a law is facially overbroad because it might restrict protected speech, it must be construed narrowly in order tc survive a constitutional challenge." And that is exactly what the court has done in several cases, beginning with *In the Matter of the Welfare of S.L.J.* The Minnesota Supreme Court has held that disorderly conduct statutes and ordinances are constitutional if the prosecution is for "fighting words". This follows the U.S. Supreme Court case of *Chaplinsky v. New Hampshire*, where fighting words are defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction or words which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

The alleged expressive conduct by the Respondent in this case most certainly constitutes "fighting words" by

such a definition. The Supreme Court, in *Texas v. Johnson*, reiterates the rule that generally, the Government has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. A cross burning, in the early morning hours, within the fenced in yard of a black family, new to the neighborhood, by some unknown trespasser or trespassers is personally abusive, it provokes a violent reaction, it inflicts injury and tends to incite an immediate breach of the peace.

Respondent asks the court to equate a cross-burning in the yard of a black family with the burning of an American flag at a political rally as in the *Texas v. Johnson* and most recent *Eichman* case. Each of these cases involved an individual PUBLICALLY burning a flag during a political rally or demonstration. It was accompanied by political rhetoric, done in public view so others could see their protest and it was directed at the government. Respondent also cites *Brandenburg v. Ohio*, a case involving a Ku Klux Klan rally at which a cross was burned. The Court upheld the right of the speaker to advocate the use of force or violation of law during this rally as a political statement. The court was upholding the right of citizens to voice a political opinion at an assembly of an organization, namely the Klan. The court does not even address the cross as it related to the First Amendment but focused on the words and statements of the speaker. In addition, the cross in *Brandenburg* was not burning in the private yard of a black family at night. In fact, there was no one present but Klan members and the press they invited. The cross and it's meaning were not directed at one individual or one family.

One activity, speech at a political rally, is protected political speech, no matter how abhorrent. The other activity, cross-burning in a private yard, represents fighting words – unprotected by the First Amendment and subject to criminal sanctions.

The Respondent also cites *Collin v. Smith*, the well-known Skokie, Illinois march case. Again, the court upholds the right of a group to express their political opinions publically. The Court notes however, "there is room under the First Amendment for the government to protect targeted listeners from offensive speech – when the speaker intrudes on the privacy of the home or a captive audience cannot practically avoid exposure." We submit that placing a burning cross in the fenced in yard of a families home is just such an intrusion of privacy.

The act of burning a cross has been upheld as a terroristic threat in Kansas in the case of *State of Kansas v. Miller*. The Kansas Court of Appeals held that a threat was not limited to a written or oral threat but could also be inferred from a physical act such as "cross burning". The Court looked to all of the circumstances surrounding the "communication" in finding the act a terroristic threat. In *U.S. v. Salyer*, the 6th Circuit U.S. Court of Appeals sustained an upward sentencing departure in a case where a cross was burned at night in the rural, isolated yard of a black family, stating these circumstances made the victims of the act particularly vulnerable. The Court referred to the historical connotation of violence, intimidation and terrorism which is symbolized by a burning cross.

Finally, we ask the Court to reflect on the "content" of the "expressive conduct" represented by a "burning cross". It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victims head. It is perhaps the ultimate expression of "fighting words".

The State asks the court to narrowly review the St. Paul bias-motivated disorderly conduct ordinance and uphold it as a Constitutional restriction on free speech under the First Amendment as unprotected "fighting words".

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT

TOM FOLEY
Ramsey County Attorney
Counsel of Record
STEVEN C. DeCOSTER
Assistant Ramsey County
Attorney
Of Counsel
350 St. Peter Street
Suite 400
St. Paul, Minnesota 55102
Telephone: (612) 292-6181
Counsel for Respondent

234-7631 — Bruce Publishing Co., 207 E. 6th St., St. Paul, Minn. 55101 — 224-7631

BEST AVAILABLE COPY

53pp

QUESTIONS PRESENTED

1. May an enactment that has been authoritatively interpreted as proscribing conduct that constitutes fighting words and incites imminent lawless action be sustained, on its face, against claims that it is substantially overbroad and impermissibly vague?

2. Is such an enactment narrowly tailored to serve the compelling state interest of protecting victims of bias-motivated harassment against violation of their basic individual rights, which, on balance, far outweigh any minimally protected expression on the part of the accused?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	5
Argument	6
I. Section 292.02 of the St. Paul, Minnesota Legislative Code, as Authoritatively Construed by the Minnesota Supreme Court, is Neither Substantially Overbroad Nor Impermissibly Vague; it is Valid on its Face and as Applied to Petitioner's Conduct	6
(A) The St. Paul Ordinance has been authoritatively construed by the Supreme Court of Minnesota	6
(B) The St. Paul Ordinance forbidding racial, religious, and gender-biased disorderly conduct is not substantially overbroad	11
(C) The St. Paul Ordinance is not impermissibly vague in violation of the Fifth Amendment to the United States Constitution	14
II. The St. Paul Ordinance May be Sustained Against Facial Attack Under the *Chaplinsky* and *Brandenburg Decisions*	16
(A) The St. Paul Ordinance may validly be enforced as conduct that tends to invite an immediate breach of the peace	16

	Page
(B) The St. Paul Ordinance may validly be enforced as conduct that by its very utterance causes injury	19
(C) The St. Paul Ordinance may validly be enforced as conduct directed to inciting or producing imminent lawless action and likely to incite or produce such action	22
III. Bias-Motivated Offenses Do Not Implicate Political Dialogue in a Public Forum	23
IV. The St. Paul Ordinance is a Content Neutral Enactment Carefully Tailored to Further the Compelling State Interest of Protecting the Fundamental Rights of Victims of Bias-Motivated Harassment	27
Conclusion	42

TABLE OF AUTHORITIES

United States Supreme Court Decisions: Page

Alderman v. United States,
394 U.S. 165 (1969) 13

Arcara v. Cloud Books, Inc.,
478 U.S. 697 (1986) 29

Barnes v. Glen Theater, Inc.,
—— U.S. ——, 59 LW 4745 (1991) 30

Bigelow v. Virginia,
421 U.S. 809 (1975) 14

Board of Airport Comm'rs of Los Angeles v.
Jews for Jesus, 482 U.S. 569 (1987) 12

Boos v. Barry,
485 U.S. 312 (1988) 13, 24, 25, 27, 35

Brandenburg v. Ohio,
395 U.S. 444 (1969) 9, 16, 22

Broadriek v. Oklahoma,
413 U.S. 601 (1973) 10, 12, 13

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 12

Brown v. Board of Education,
347 U.S. 483 (1954) 37

Cantwell v. Connecticut,
310 U.S. 296 (1940) 15

Carey v. Brown,
447 U.S. 455 (1969) 33

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 9, 15, 16, 17, 18

City of Dallas v. Stanglin,
490 U.S. 19 (1989) 19

Page

City of Houston v. Hill,
482 U.S. 451 (1987) 10, 11, 18

City of Los Angeles v. Preferred Communications,
Inc., 476 U.S. 488 (1986) 32

City of Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1986) 29, 30

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 29, 31

Coates v. City of Cincinnati,
402 U.S. 611 (1971) 13

Cohen v. California,
403 U.S. 15 (1971) 23, 27

CISPES (Committee in Solidarity with the People
of El Salvador) v. Federal Bureau of Investigation,
770 F.2d 468 (5th Cir. 1985) 35

Connally v. General Construction Co.,
269 U.S. 385 (1926) 14

Dombrowski v. Pfister,
380 U.S. 479 (1965) 12

Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 19

Eichman v. United States,
496 U.S. ——, 110 S.Ct. 2404 (1990) 23

Erznoznik v. City of Jacksonville,
422 U.S. 204 (1975) 11, 36

F.C.C. v. Pacifica Foundation,
438 U.S. 726 (1988) 18

Fox v. Washington,
236 U.S. 273 (1914) 15

Page

Frisby v. Schultz,
487 U.S. 474 (1988) 10, 30, 31, 32, 33
Gooding v. Wilson,
405 U.S. 518 (1972) 11, 17, 18
Grayned v. City of Rockford,
408 U.S. 104 (1972) 19
Hess v. Indiana,
414 U.S. 105 (1973) 17
Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 13
Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 18, 19
International Society for Krishna Consciousness,
452 U.S. 604 (1981) 29
Kovacs v. Cooper,
336 U.S. 77 (1949) 33
Land v. Taturn,
408 U.S. 1 (1972) 14
Lewis v. City of New Orleans,
415 U.S. 130 (1974) 11, 17, 18
Lucas v. Arkansas,
416 U.S. 919 (1974) 11
Massachusetts v. Oakes,
491 U.S. 576 (1989) 10, 12
Members of City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 25, 32
N.A.A.C.P. v. Button,
371 U.S. 415 (1963) 12
Nash v. United States,
229 U.S. 373 (1913) 14, 15

Page

New York v. Ferber,
458 U.S. 747 (1982) 32
Rankin v. McPherson,
483 U.S. 378 (1987) 20
Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1985) 29, 30
Sable Communications of California, Inc. v. F.C.F.,
492 U.S. 115 (1989) 30
Schaumburg v. Citizens for a Better Environment,
444 U.S. 620 (1980) 17
Schenck v. United States,
249 U.S. 47 (1919) 22
Shad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 30, 31
Street v. New York,
394 U.S. 576 (1969) 18
Texas v. Johnson,
491 U.S. 397 (1989) 8, 23, 27, 34
Thornhill v. Alabama,
310 U.S. 88 (1940) 15
United States v. Albertini,
472 U.S. 675 (1985) 31
United States v. O'Brien,
391 U.S. 367 (1968) 27, 28, 32, 34
United States v. Price,
383 U.S. 787 (1966) 35
United States v. Schenck,
249 U.S. 47 (1919) 22
Virginia Pharmacy Board v. Virginia Citizens
Consumer Council, Inc., 425 U.S. 748 (1976) 29

Page

Virginia v. American Bookseller's Ass'n, Inc.,
488 U.S. 905 (1988) 10
Ward v. Rock Against Racism,
491 U.S. 781 (1989) 10, 28
Watts v. United States,
394 U.S. 705 (1969) 20
Wayte v. United States,
470 U.S. 598 (1985) 30

Federal Decisions:
Collin v. Smith,
578 F.2d 1197 (7th Cir. 1978) 24, 25, 27
United States v. Hoffman,
806 F.2d 703 (7th Cir. 1986) 20
United States v. Khorrami,
895 F.2d 1186 (7th Cir. 1990) 20
United States v. Lee,
935 F.2d 952 (8th Cir. 1991) 33, 36, 40
United States v. Merrill,
746 F.2d 458 (9th Cir. 1984) 20, 21
United States v. Mitchell,
812 F.2d 1250 (9th Cir. 1987) 20
United States v. Orozco-Santillan,
703 F.2d 1262 (9th Cir. 1990) 21
United States v. Salyer,
893 F.2d 113 (6th Cir. 1989) 33, 38
United States v. Skillman,
922 F.2d 1370 (9th Cir. 1991) 33, 38, 39, 40
United States v. Worthy,
915 F.2d 1514 (11th Cir. 1990) 33

Page

Williams v. Matthew Co.,
499 F.2d 819 (8th Cir. 1974) 35

Minnesota Decisions:
City of Little Falls v. Witucki,
295 N.W.2d 243 (Minn. 1980) 9
City of Minneapolis v. Lynch,
392 N.W.2d 700 (Minn. Ct. App. 1986) 9
City of St. Paul v. Mulnix,
304 Minn. 456, 232 N.W.2d 206 (Minn. 1975) 9
In re R.A.V.,
464 N.W.2d 507 (Minn. 1991) ..... *passim*
In re S.L.J.,
263 N.W.2d 412 (Minn. 1978) 9
State v. Hipp,
298 Minn. 81, 213 N.W.2d 610 (1973) 10
State v. Klimek,
398 N.W.2d 41 (Minn. Ct. App. 1986) 10
State v. Schweppe,
306 Minn. 395, 237 N.W.2d 609 (1975) 21

Foreign Decisions:
State v. Miller,
6 Kan.App.2d 432, 629 P.2d 748 (1981) 21
Village of Skokie v. National Socialist Party of
America, 69 Ill.2d 605, 373 N.E.2d 21 (1978) 24

United States Constitution:
U.S. Const. amend. I ..... *passim*
U.S. Const. amend. V 14
U.S. Const. amend. XIII 35

Federal Statutes: Page

18 U.S.C. § 112 (1990) 35
18 U.S.C. § 241 (1990) 33, 34
18 U.S.C. § 871 (1990) 20

Minnesota Statutes:

Minn. Stat. § 260.181, subd. 4 1
Minn. Stat. § 609.02, subd. 10 26
Minn. Stat. § 609.2231, subd. 4 ..... 4, 26
Minn. Stat. § 609.595 26
Minn. Stat. § 609.605, subd. 1 26
Minn. Stat. § 609.705 10
Minn. Stat. § 609.72 ..... 9, 26
Minn. Stat. § 609.713, subd. 1 26
Minn. Stat. § 609.746, subd. 2 26

Ordinance:

St. Paul, Minn. Leg. Code § 292.01 (1990) 4
St. Paul, Minn. Leg. Code § 292.02 (1990) ..... *passim*

Other Sources:

Delgado, *Words that Wound: A Tort Action for Racial Insults*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) 37, 38
Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303 (1986) 37
Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) 7, 37

IN THE

Supreme Court of the United States

October Term, 1991

No. 90-7675

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE[1]

On June 21, 1990, between the approximate hours of 1:00 and 3:00 a.m., Petitioner R.A.V.—then a juvenile[2]—was with

[1] Since there has been no trial on the charges, Respondent has attempted to state the facts, insofar as they pertain to Petitioner's involvement in the offense, based on police reports and statements that were attached to the petition alleging delinquency and in addition, that were discovered to the defense on July 4, 1990 as part of the prosecution's continuing duty of disclosure. On a motion to dismiss, facts in support of the prosecution's charges are assumed to be true. Moreover, one needs the factual context to analyze the various legal issues raised.

[2] Petitioner became 18 years old on March 13, 1991 and when he becomes 19, all juvenile court jurisdiction over him will end pursuant to Minn. Stat. § 260.181, subd. 4.

a group of other young white males who were good friends of each other and had been ingesting controlled substances and were attempting to find further supplies to consume.

At the first house where they stopped, no one was home, and the group collectively decided to go to Mounds Park. On the way they stopped by 291 Earl Street where two of the group spoke with those in the house through the window. Then the group entered the house.

291 Earl Street is the residence of Arthur Miller, II. Petitioner R.A.V. was then staying at Mr. Miller's house and doing some painting for him. At the time, Miller's son, co-defendant Arthur Miller, III,[3] and Petitioner were in the home alone. Miller and Petitioner had had some alcohol to drink and were the central instigators and enthusiastic supporters of the cross-burning that followed.

Petitioner went about the house to find the necessary materials and Petitioner and Miller set about the making of a cross. They used approximately two-feet long dowels from the legs of a broken chair they taped together to form a cross, which they then wrapped in terrycloth obtained from Petitioner's painting project. A propane tank was taped onto the horizontal member of the cross. Next to it was a shellac thinner can containing a small amount of flammable fluid.

Once it was completed, the six young men took the cross and a can of paint thinner across the street to 290 Earl Street in order to plant it in the lawn and light it. All six youths knew the residents of 290 Earl Street were African American.

The group of six went through the fence and onto the lawn

[3] Arthur Miller, III, who was eighteen years old on June 21, 1990, was charged with violation of St. Paul, Minn. Leg. Code § 292.02 and entered a plea of guilty to the offense.

of 290 Earl Street, and Petitioner, co-defendant Miller, and possibly one of the others, were involved in placing the cross, dousing it with paint thinner and lighting it. After the cross ignited, the group ran back to 291 Earl Street to hide. When the police came, the boys stayed inside as they began their production of a second and third cross. Again, Petitioner and Miller were the main instigators.

The complainant, an African American male who resides at 290 Earl Street, said he heard voices in his yard and when he went to look out the window, he saw a large flame burning in his yard. Though he saw no one, the complainant heard at least two voices. He was concerned because his was the only African American family living in the immediate neighborhood. He said he didn't know who could have done this.

Though the complainant and his five children, who ranged in age from six months to nine years, had experienced other acts of vandalism and name-calling over the preceding several months, there was no evidence these young men had been involved in any of them.

After the officers had left, a second cross was placed on the boulevard across the street from 290 Earl Street. Miller and Petitioner were involved in the placing and lighting of it.

When it was burning, the group made its way to a nearby apartment complex. There they lit a third cross in the parking lot on the northwest corner of Earl Street and Suburban Avenue. There are several African American families in this complex.

The group then ran back to 291 Earl Street where they remained briefly when Miller told them to leave before his father came home. Petitioner stayed on in the Miller home as he had before.

Petitioner admitted—indeed in one instance, bragged about —his involvement in the cross burning to two separate witnesses on the following day.

Pieces of a chair were found and seized at 291 Earl Street that matched the charred dowels formed into the cross found at the scene of the offense.

Four days after, on June 25, 1990, Respondent filed in the Juvenile District Court for Ramsey County, Minnesota a complaint charging Petitioner R.A.V., in two counts, with violation of Minn. Stat. § 609.2231, subd. 4 (bias-motivated assault in the fourth degree) and St. Paul, Minn. Leg. Code § 292.01 (bias-motivated assault).

On July 5, 1990, Count II was amended to charge bias-motivated disorderly conduct under St. Paul, Minn. Legis. Code § 292.02 which provides as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Juvenile District Court, Honorable Charles A. Flinn, Jr., on July 16, 1990 by order dismissed Count II, which order was by the State appealed to the Minnesota Court of Appeals. The Minnesota Supreme Court on August 3, 1990 granted direct accelerated review and by its opinion filed January 18, 1991 reversed the Juvenile Court, reinstated Count II of the petition and remanded the cause for trial on both counts. The opinion is reported at 464 N.W.2d 507 (Minn. 1991).

R.A.V. sought certiorari from that decision by petition filed on April 11, 1991, which petition was by order of this Court granted on June 10, 1991.

SUMMARY OF ARGUMENT

The St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02, as authoritatively construed and limited by the Minnesota Supreme Court, is neither substantially overbroad nor impermissibly vague in what it forbids. It can be defended against attack under the First Amendment to the United States Constitution as an enactment proscribing fighting words, true threats, and conduct directed to inciting or producing imminent lawless action.

Particularly in light of the carefully limited *scienter* provision that requires the prosecution to prove the acts of the accused were targeted against particular victims with a particular purpose, the Ordinance may not be applied to political expression in a traditional public forum. Therefore, the Ordinance does not have a chilling effect on such expression.

The Ordinance should not be subject to strict scrutiny, as it is content-neutral in the sense that its purpose is to protect victims from carefully defined harms, rather than to impact protected speech or forbid it based on its expressive content. In addition, strict scrutiny is inappropriate because the Ordinance does not forbid all bias-motivated conduct but only that employed with the requisite state of mind as defined.

Even if the Ordinance is assumed to be content-based, a compelling state interest exists to support it—protecting victims from violation of their basic human rights to self-esteem and security as members of groups historically subject to discrimination. The Ordinance is narrowly drawn to reach those goals.

Racial, religious, and gender-specific bias-motivated conduct deters the most important aspect of speech, the establishing of dialogue. On balance, the minimal First Amendment rights of one who clandestinely burns a cross in an African American's yard are far outweighed by the rights of the victims to live where they wish in peace.

ARGUMENT

I. SECTION 292.02 OF THE ST. PAUL, MINNESOTA LEGISLATIVE CODE, AS AUTHORITATIVELY CONSTRUED BY THE MINNESOTA SUPREME COURT, IS NEITHER SUBSTANTIALLY OVERBROAD NOR IMPERMISSIBLY VAGUE; IT IS VALID ON ITS FACE AND AS APPLIED TO PETITIONER'S CONDUCT.

(A) The St. Paul Ordinance has been authoritatively construed by the Supreme Court of Minnesota.

R.A.V., a juvenile, was charged in Count II of an amended petition of delinquency filed in the Juvenile Court for Ramsey County, Minnesota, with having violated St. Paul, Minn. Leg. Code § 292.02 (1990). This Ordinance provides that:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V.'s motion to dismiss that count was granted by the trial court and the prosecution appealed, being granted accelerated direct review in the Minnesota Supreme Court. That

court reversed, *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991), and remanded for trial on both counts.

The Minnesota Supreme Court, at the outset of its unanimous decision, stressed the particular power historically found to inhere in certain symbols that target others based on their race, color, creed, religion or gender—the essential bedrock factors around which each of us organizes our essential identity within our community.

> Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1][*] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

In re R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

Noting that Petitioner did not claim the Ordinance was invalid as applied to his alleged conduct, the Minnesota Supreme Court then turned to the language of the Ordinance in light of prior authority construing similar provisions to determine whether it passed muster on its face against challenge under the First Amendment to the United States Constitution.

---

[*]

[1] *See* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples of signs—like all signs—that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context.

Id. (footnotes omitted).

The St. Paul City Ordinance does not proscribe the use of racial, religious, or gender-specific symbols in all circumstances. As construed, the Ordinance applies only where the "symbol, object, appellation, characterization or graffiti", defined as a burning cross, Nazi swastika or other instrumentality of like import, is placed on public or private property with a particular *scienter* requirement.

To save the Ordinance from the challenge of substantial overbreadth, the Minnesota Supreme Court defined the Ordinance's element of *scienter*[4] in light of this Court's reasoning in *Texas v. Johnson*, 491 U.S. 397 (1989), forbidding prosecution of an individual for burning a United States flag outside Dallas City Hall under the state's "desecration of venerated objects" statute.

> The Court noted that the state had *not* alleged that Johnson's conduct actually disturbed the peace or that it threatened to immediately do so. *Id.* at 2541, 2548. Rather, the state contended that *every* flag burning necessarily possessed the potential to disrupt public safety and order, which empowered it to censor all such conduct. *Id.* at 2542. In rejecting this argument, the Court stated that the first amendment does not permit "the Government to *assume* that *every* expression of a provocative idea will incite a riot, but [instead requires] careful consideration of the *actual circumstances* surrounding such expression." *Id.* (emphasis added).

In re R.A.V., 464 N.W.2d at 510.

Applying these principles to the St. Paul Ordinance, the Minnesota Court limited it to:

---

[4] ". . . which ones knows or has reason to know arouses anger, alarm or resentment in others. . . ." St. Paul, Minn. Leg. Code § 292.02 (1990).

(a) "fighting words," " 'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,' " *In re R.A.V.*, at 510. (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); and (b) conduct that is " 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action,' " *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

The existence of *scienter*, as defined by the Minnesota Supreme Court, that the State must prove, must be inferred from the words and acts of the accused. That is, the context in which the symbol is used. It is for the trier of fact to decide whether the State in a particular case has shouldered its burden of persuasion.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the case in which the Court first applied the fighting words doctrine to what was claimed to have been expressive speech, the Court accepted the authoritative limiting interpretation by the highest court of New Hampshire both as to the purpose and terms of the enactment which was challenged and as to its severability from other provisions. *Id.* at 572-73. *See also, Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws").

In the instant case, the interpretation of the St. Paul Ordinance was consistent with numerous prior decisions of the Supreme Court of Minnesota construing identical or very similar language in state or municipal enactments. *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978) and *State v. Klimek*, 398 N.W.2d 41 (Minn. Ct. App. 1986) (Minn. Stat. § 609.72, state statute on disorderly conduct); *City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980); *City of St. Paul v. Mulnix*, 304 Minn. 456, 232 N.W.2d 206 (1975), and *City of Minneapolis v. Lynch*, 392 N.W.2d 700 (Minn. Ct. App.

1986) (city disorderly conduct ordinances); *State v. Hipp*, 298 Minn. 81, 213 N.W.2d 610 (1973) (Minn. Stat. § 609.705 (3), state statute on unlawful assembly).

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court held that facial overbreadth may not be invoked when such a limiting construction has been authoritatively placed on a challenged statute in state court. *Id.* at 613.

In this Court's recent decisions, the rule continues to be stated that "'[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795-796 (1989), (citations omitted) *reh'g denied*, 492 U.S. 937 (1989). *See also Massachusetts v. Oakes*, 491 U.S. 576 at 581-583 (1989); *Frisby v. Schultz*, 487 U.S. 474 (1988).

In Argument I of his brief, Petitioner claims the St. Paul Ordinance is substantially overbroad and vague based on its provisions *as written*, ignoring the Minnesota Supreme Court's limiting definition that this Court's decisions require be considered. His first argument is therefore irrelevant.

This Court has in fact certified issues of statutory construction to the appropriate state to permit its highest court to interpret a law's meaning where an authoritative construction would substantially aid review of a First Amendment question posed. *Virginia v. American Bookseller's Ass'n, Inc.*, 488 U.S. 905 (1988). This remedy has not been held to be appropriate where the clear import of the enactment's language precludes a narrowing construction that will save its constitutionality. *See City of Houston v. Hill*, 482 U.S. 451 (1987) (Court will not abstain to permit state court to decide issue or certify issue to state Court; "[t]his ordinance is not susceptible to a limiting construction because . . . its language

is plain and its meaning unambiguous." *Id.* at 468); *Erznoznik v. City of Jacksonville*, 422 U.S. 204, 216-217 (1975) (possibility of limiting instruction remote; state court previously made no attempt to limit its application).

At the outset of Argument II of his Brief, Petitioner misplaces his reliance on the latter line of authority. It applies only to situations, unlike that in the present case, where the state court has not, or will not, essay definitive limiting construction. Then and only then this Court has held it would not certify an issue, or abstain from deciding, when there is no reason to do so.

As opposed to the ordinance in the instant case, the failure of state courts properly to limit the definition of similar enactments to fighting words has led this Court to declare them invalid on their face or as applied to expressions that were merely disturbing, annoying, or offensive. *See e.g., Lucas v. Arkansas*, 416 U.S. 919, 920 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).

(B) The St. Paul Ordinance forbidding racial, religious, and gender-biased disorderly conduct is not substantially overbroad.

Petitioner asks this Court to invalidate on its face the municipal ordinance under which he is charged—even though his conduct could be punished under the ordinance without violation of his constitutional rights. He makes this claim under the doctrine of substantial overbreadth; that the pendency of his prosecution will work a chilling effect on the exercise by others of their right to free expression.

The overbreadth rule has been judicially fashioned in derogation of

> the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others. *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985).
>
> * * *
>
> Overbreadth doctrine has wide-ranging effects, for a statute found to be substantially overbroad is subject to facial invalidation. We have therefore referred to overbreadth as "manifestl[y] strong medicine" that is employed "sparingly, and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (O'Connor, J., plurality opinion).

Application should be limited to situations where there exists a penal statute " 'susceptible of sweeping and improper application.' " *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)).

Broadrick v. Oklahoma, 413 U.S. 601 (1973), adds the caveat that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Id.* at 614-615. (citations omitted).

This is particularly significant in the instant case where conduct and not pure speech is proscribed.

> It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and

> when "such summary action" is inappropriate. *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971) (opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. *Cf. Alderman v. United States*, 394 U.S. 165, 174-175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Broadrick v. Oklahoma, 413 U.S. at 615.

Accord Boos v. Barry, 485 U.S. 312 (1988); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Substantial overbreadth is absent unless there is an objective basis for predicting that the right of expression of others,

will materially be chilled. *Land v. Taturn*, 408 U.S. 1, 13-14 (1972); *Bigelow v. Virginia*, 421 U.S. 809, 817-818 (1975). Clearly, no such basis exists in the instant case.

However the substantial overbreadth test is articulated it seems speculative at best, absurd at worst, to postulate that there will be significant amounts of expressive conduct chilled by the mere existence of this bias-related ordinance on the books and by Petititioner's pending prosecution for violation of it. Only where one uses a bias-motivated symbol with the requisite *scienter* is the Ordinance applicable. The prosecution must prove, to the satisfaction of the trier of fact, bias-motivated conduct in either of two contexts:

(a) where "directed to inciting or producing imminent lawless action and likely to incite or produce such action," or

(b) which, "by [its] very expression, inflict[s] injury or tend[s] to incite an immediate breach of the peace." *In re R.A.V.*, 464 N.W.2d at 510.

As so limited, the Ordinance is not colorably "susceptible of sweeping and improper application."

(C) The St. Paul Ordinance is not impermissibly vague in violation of the Fifth Amendment to the United States Constitution.

It is settled that "a statute, which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). On the other hand, as Justice Holmes observed, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only

may he incur a fine or a short imprisonment, . . . he may incur the penalty of death." *Nash v. United States*, 229 U.S. 373, 377 (1913).

As Justice Murphy concluded in *Chaplisky v. New Hampshire*, 315 U.S. 569 (1942):

> We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. *Cf. Cantwell v. Connecticut*, 310 U.S. 296 [(1940)]; *Thornhill v. Alabama*, 310 U.S. 88, 105 [(1940)]. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. *Cf. Fox v. Washington*, 236 U.S. 273, 277 [(1914)].

Id. at 573 (footnote omitted).

As in *Chaplinsky*, the ordinance in the instant case has been narrowed and clarified carefully to define what conduct is proscribed and what is not.

The critical limitation in the St. Paul Ordinance as defined lies in the *scienter* element. The prosecution must prove that the accused used a bias-related symbol to threaten, cause fear in, or intimidate a particular targeted person or persons. The context in which actions take place reasonably leads to a fair inference as to the intent with which they were taken.

Given this fact, it is fair to criminalize the placement of a bias-motivated symbol on public or private property so long as it is evident who the targeted victims are.

Petitioner claims that the Minnesota Supreme Court's definition, even as it may have eliminated some problems of overbreadth, has introduced "functional vagueness" in enforcement. This is not the case. The St. Paul Ordinance has no more danger of unequal enforcement than does any other enactment.

Moreover, the *scienter* provisions in many like enactments in Minnesota and elsewhere have been similarly construed, increasing the regularity and predictability of their application.

II. THE ST. PAUL ORDINANCE MAY BE SUSTAINED AGAINST FACIAL ATTACK UNDER THE *CHAPLINSKY* AND *BRANDENBURG* DECISIONS.

(A) The St. Paul Ordinance may validly be enforced as conduct that tends to invite an immediate breach of the peace.

The Minnesota Supreme Court in *R.A.V.*, 464 N.W.2d at 510, defined the St. Paul Ordinance in light of the fighting words doctrine citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1952); " 'those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace;' 315 U.S. at 572." The Minnesota Supreme Court's decision stated further that

> [a]lthough the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980), and therefore is not prohibited by the first amendment.

R.A.V., 464 N.W.2d at 511.

Justice Murphy's opinion for the Court in *Chaplinsky* states:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 571-572 (footnotes omitted).

In a number of cases since *Chaplinsky* was decided, this Court held that the enactments at issue went beyond the fighting words exception and either had not been limited or restrictively defined in state court decisions, or were not susceptible of such construction. *See, e.g., Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972).

In dissenting opinions in all three of these cases, Justices Rehnquist and Blackmun stressed that the Court was "invalidating state statutes in wholesale lots because they 'conceivably might apply to others who might utter other words.' "

Lewis v. City of New Orleans, 415 U.S. at 137 (Blackmun, Rehnquist, JJ., dissenting), *quoting Gooding v. Wilson*, 405 U.S. at 535 (Blackmun, J., dissenting).

In *Gooding*, the Court seized on turn-of-the-century decisions in holding the statute was overbroad; in *Lewis*, the Court ignored the state court's decision, on remand in light of *Gooding*, that the statute was properly construed as limited to fighting words.

This Court's most recent "fighting words" case, *City of Houston v. Hill*, 482 U.S. 451 (1987), held the ordinance at issue substantialy overbroad. However, *the ruling did not impact the fighting words doctrine of Chaplinsky itself*, that fighting words are "no essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572.

Other more recent of this Court's cases have been held to implicate "marginal expression" that by its very nature is less entitled to protection under the First Amendment. This Court has never taken the position that freedom of expression holds absolute primacy over any competing interest. To admit that expression is involved is, therefore, not the end of inquiry, but merely its beginning.

Whereas it is "firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," *Street v. New York*, 394 U.S. 576, 592 (1969), this Court recognized in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988):

> that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." [*F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 747 (1988)]. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), we held that a state could lawfully punish an individual for the use of insulting " 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 571-572. These limitations are but recognition of the observation in *Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance."

Hustler Magazine v. Falwell, 485 U.S. at 55-56 (1988).

See also, Grayned v. City of Rockford, 408 U.S. 104, 112-114 (1972) (proper to enforce noise ordinance in vicinity of school for willfully causing a "noise or disruption" incompatible with normal school activity).

"It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

Cross-burning is the expressive equivalent of a brutish grunt; in like manner only marginally within the outer perimeters of protected expression. One prohibited from cross-burning still has all other means of expression avaiable to express his views about African Americans or any other minority group. Limited protection is accorded expression of limited content.

(B) The St. Paul Ordinance may validly be enforced as conduct that by its very utterance causes injury.

A part of the rationale of the Minnesota Supreme Court's decision upholding the ordinance here at issue involved the State's undoubted authority to prohibit conduct or words "that

by their very utterance inflict injury." That is, threaten harm to others. *In re R.A.V.*, 464 N.W.2d at 510. The Minnesota Supreme Court relied on the fact that the use of a burning cross is "an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy." *Id.* at 508.

It is settled that a statute forbidding threats of physical violence to another is constitutional on its face. Nevertheless, in its application, what is a genuine threat must be distinguished from what is constitutionally protected speech. *Watts v. United States*, 394 U.S. 705, 707 (1969) (statute makes threat to President of the United States criminal offense); *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987). The context is important in determining whether an apparent threat is indeed a true threat. *See United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990).

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. [*United States v.*] *Mitchell*, 812 F.2d [1250] at 1255-56 [(9th Cir. 1987)] (reasonable person standard employed in determining whether statement is threat under 18 U.S.C. § 871); [*United States v.*] *Merrill*, 746 F.2d 458, 462 [(9th Cir. 1984)]. Although a threat must be "distinguished from what is constitutionally protected speech" (*Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam)), this is not a case involving statements with a political message. A "true" threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment. *Merrill*, 746 F.2d at 462.

United States v. Orozco-Santillan, 703 F.2d 1262, 1265-66 (9th Cir. 1990) (footnote omitted).

The objective test has generally been applied throughout the Federal Circuits. *Merrill*, 746 F.2d at 462.

Under Minnesota law, it is clear that the "true" threat need not be conveyed directly and in person to the intended victim. *State v. Schweppe*, 306 Minn. 395, 237 N.W.2d 609 (1975). "A threat," the court held, "is a declaration of an intention to injure another or his property by some illegal act." *Id.* at 399, 237 N.W.2d at 613. Evidence of purpose "requires either a direct threat to the victim or a threat made in such a way as to support the inference that the speaker intended it to be conveyed to the victim." *Id.* at 400, 237 N.W.2d at 614.

Based on its historical and cultural subtext, the burning of a cross under circumstances where it is aimed against one or a group of victims *is* such a threat. It is a question for the trier of fact to determine whether the actor intended that message to be conveyed to the victims. In this case, the fact finder certainly could—and necessarily would—so find. *See e.g., State v. Miller*, 6 Kan.App.2d 432, ——, 629 P.2d 748, 751 (1981).

So long as the question of who is intended to be victimized is clear, it should not make a difference whether the accused enters onto private property to burn the cross. The difference between a fenced yard and an open boulevard is germane only to ascertaining the intent of the actor.

(C) The St. Paul Ordinance may validly be enforced as conduct directed to inciting or producing imminent lawless action and likely to incite or produce such action.

The Minnesota Supreme Court relied on this Court's holding in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) to formulate an alternative justification for the Ordinance—that it criminalizes solicitation and incitation of others to commit violent acts. Of critical importance is the nexus between the solicitation and the imminency of the violent response.

The holding in *Brandenburg* itself deals with Ohio's criminal syndicalism law, which purported to, and did, punish mere advocacy of violence and assembly with others for that purpose. There the act of cross-burning took place at a Ku Klux Klan rally, not in the yard of a Black family who had moved into an otherwise white neighborhood. The Court agreed Ohio could proscribe advocacy directed to inciting or producing imminent lawless action—the very limitation deemed implicit in the St. Paul Ordinance as construed by the Minnesota Supreme Court. It did not agree that advocacy of violence in the abstract was subject to proscription.

As Justice Holmes stated in his opinion in *Schenck v. United States*, 249 U.S. 47 (1919),

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. at 52.

Cross-burning, by nature and history, is intimidating to anyone targeted. The only issue is thus whether the threat is clear and present.

To an African American family, the meaning of a burning cross in one's lawn is not remotely ambiguous.

Cross-burning, at least directly, carries no message other than to its targeted victim, who is both captive and vulnerable. The reasonable, even inevitable belief of the victim is that he is to be further targeted with physical injury or death unless he, as coerced, departs from the neighborhood.

III. BIAS-MOTIVATED OFFENSES DO NOT IMPLICATE POLICICAL DIALOGUE IN A PUBLIC FORUM.

The cases upon which Petitioner urges this Court to invalidate the Saint Paul Ordinance, principally the flag burning cases, are simply inapposite. In *Texas v. Johnson*, 491 U.S. 397 (1989) and *Eichman v. United States*, 496 U.S. ——, 110 S.Ct. 2404 (1990), American flags were burned in public as part of protest demonstrations. Each actor intended to express his dissatisfaction with the policies of his government and his action was not directed at any individual but intended to make a statement of opinion. There was no evidence that a breach of the peace was threatened, or even likely.

Flag burning or disrespect is profoundly and deeply offensive to most Americans but none would regard it as threatening or intimidating—nor in any way inimical to their living their lives as they have theretofore done.

So it was in *Cohen v. California*, 403 U.S. 15 (1971) when Cohen appeared in a courthouse corridor, a distinctly public place, wearing a jacket that bore on it the words "Fuck the Draft," words that could obviously offend others. His conviction was reversed, this Court holding that "fighting words" properly could be invoked only where the declarant sought to provoke a violent response, and that Cohen's words were

politically expressive even though partly emotive in content.

The Court applied the same distinctions in the Skokie, Illinois Nazi march cases. *See Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. den.*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 69 Ill.2d 605, 373 N.E.2d 21 (1978). At issue in both of these decisions was the constitutionality of prohibiting or restricting a Nazi march. The proposed march was a *public* march and was not directed at any specific individual. While holding that the expressive content of the march could not be prohibited under the First Amendment, the Seventh Circuit proceeded to state: "There is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure." 578 F.2d at 1206. The Illinois Supreme Court held that the Nazis had a constitutional right to conduct the march, noting that the planned march had become common knowledge, that there was ample forewarning of its potentially offensive content, and that therefore a person could avoid a confrontation with the march. Once again, however, the Illinois Court reaffirmed that expressive conduct was not similarly protected when imposed on the privacy of one's home or on a captive audience. 69 Ill.2d at 609, 373 N.E.2d at 26.

The Jewish citizens of Skokie asserted outrage and abhorrence of the message of the Nazi marchers but did not express either a fear of violence by citizens from the marchers or by the marchers from them.

A similar distinction applies to *Boos v. Barry*, 485 U.S. 312 (1988), wherein this Court held that a federal statute prohibiting picketing within 500 feet of a foreign embassy was

unconstitutional as violative of the First Amendment. However, in so holding, the Court indicated its approval of another federal statute which prohibited willful acts or attempts to " 'intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties.' " *Id.* at 324-25 (citation omitted).

Petitioner has misconstrued the definition of "public forum" in this Court's decisions; any expression on public property is not made in a public forum, a concept that characterizes those places that have by tradition or rule been designated or understood to be places for an individual's or groups' free expression. *Members of the City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813-14 (1984).

Core political expression depends on context. Things like picketing (as in *Boos v. Barry, supra*), marching (as in *Collin v. Smith, supra*), and politically demonstrating (as in the flag burning cases) are commonly understood to lie at the heart of public expression, even though acts and not words are involved. Core political expression admittedly may not be proscribed for any but compelling reasons.

Secret cross burners and public flag burners are similar only in the unpopularity of the position that they take. The First Amendment does protect the unpopular. It does not, however, protect acts, the only expressive content of which is to threaten others.

History dictates that there is a need for *specific* enactments to deal with the use of symbols of racial, religious, ethnic or other group hatred. Otherwise, there is a danger that minority groups will not understand that this aspect of the behavior they have experienced is not condoned by the majority. This is a lesson the majority also must understand and openly acknowledge.

Therefore, Petitioner's often repeated argument that bias-related crimes may properly be prosecuted adequately under the general criminal laws is fatally flawed.[5] Only where the bias-motivated aspects of the conduct is explicitly addressed can dialogue start that will lead to reconciliation and peace among communities.

---

[5] Petitioner, in his Brief, greatly overstates the applicability of Minnesota's general penal provisions as they relate to the alleged cross burning in this case. Minnesota's bias-motivated assault statute (Minn. Stat. § 609.2231, subd. 4) applies only to an act "done with *intent* to cause fear in another of *immediate* bodily harm or death" of the infliction of actual bodily harm (Minn. Stat. § 609.02, subd. 10) (emphasis added). The fear of harm experienced by the African American family in the instant case, while very real, may not be sufficiently immediate, nor may the requisite specific intent exist, to come within this definition. The terroristic threats provision (Minn. Stat. § 609.713, subd. 1) applies only when the *purpose* of a threat is to terrorize another. The trespass provision (Minn. Stat. § 609.605, subd. 1) applies only when a person refuses to leave private property or returns to the property after being told to leave. Similarly, the Minnesota interference with privacy provision (Minn. Stat. § 609.746, subd. 2) applies only if a person repeatedly follows or pursues another after being told not to do so. Minnesota's criminal damage to property provision (Minn. Stat. § 609.595) may have no application at all in the instant case, since Petitioner burned his own property, and no incidental burning of the victims' surrounding property is alleged. More fundamentally, whatever incidental damage to property may have occurred misses entirely the essence of the injury sustained and the crime committed. Finally, even Minnesota's disorderly conduct statute (Minn. Stat. § 609.72, subd. 1) applies to "offense, obscene or abusive language." Notwithstanding Petitioner's stance before this Court, Petitioner, if charged under the statute, undoubtedly would maintain that the *act* of burning a cross did not constitute language.

A late-night cross burning poses an anonymous, indefinite threat. The inability of the victim to identify the cross burner and to know when, where and how he will strike next, adds to the fear and terror of the victim. The specific harm caused by the burning cross is not directly addressed by any of the foregoing general penal provisions. Even if one or more of the other provisions applies, the mere overlap or duplication of penal provisions does not raise First Amendment issues.

The nature of the act depends on the context in which it is committed; Petitioner acted with a small group at night, his "expression" conveyed only—at least directly—to his victims, and indirectly to members of his victims' racial group.

The "context" was not one of expressing himself to others in the hope of eliciting their support. He did not act in a public forum; his acts or words—which are essentially equivalent—were not uttered as part of a peculiarly expressive event, as would be the case of (a) wearing clothing with a message on it, *Cohen v. California, supra*; (b) demonstrating politically (flag burning), *Texas v. Johnson, supra;* (c) picketing, *Boos v. Barry, supra*; or (d) parading, *Collin v. Smith, supra.* The cross burner does not shop in Justice Holmes' marketplace of ideas. He is not interested in his victim's responding, or in starting a dialogue. He wants his victim to be silent and intimidated, and simply to leave.

IV. THE ST. PAUL ORDINANCE IS A CONTENT-NEUTRAL ENACTMENT CAREFULLY TAILORED TO FURTHER THE COMPELLING STATE INTEREST OF PROTECTING THE FUNDAMENTAL RIGHTS OF VICTIMS OF BIAS-MOTIVATED HARASSMENT.

In *United States v. O'Brien*, 391 U.S. 367 (1968), a case involving draft card burning, Chief Justice Warren, for the Court, held that:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registra-

tion certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-377 (footnotes omitted).

Under the *O'Brien* test, the conduct of the accused which is criminalized must further a legitimate governmental purpose unrelated to the suppression of free expression. To decide this issue, the Court analyzes the enactment in terms of its purpose or justification, which is the controlling consideration. *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989).

In the instant case, the Ordinance is intended not to impact on the right of free expression of the accused but rather to protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against. The governmental purpose evaluation looks particularly to the

effects, primary and secondary, on the victims. In *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1985), this Court evaluated the purpose of a city ordinance prohibiting adult movie theaters from locating within a certain distance of residential zones, churches, parks, or schools. This Court held:

> In short, the . . . ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added); *Community for Creative Non-Violence, supra,* [468 U.S.] at 293; *International Society for Krishna Consciousness, supra,* [452 U.S.] at 648. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley, supra,* [408 U.S.] at 95-96.

City of Renton v. Playtime Theaters, Inc., 475 U.S. at 48-49 (1986).

The operative condition for the Ordinance to be applied in the instant case is the actual or attempted coercion of the targeted victims, worked through threatening and intimidating acts. The constitutionality of enforcement of the Ordinance is manifest even if there is an incidental effect on conduct the accused claims is the equivalent of protected expression. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In this Court's recent decision in *Barnes v. Glen Theater, Inc.*, —— U.S. ——, 59 LW 4745 (1991), the plurality opinion identifies preventing public nudity, and not nude expressive dancing, as the governmental interest advanced. Of relevance to the instant case, the opinion points out that enforcement of the anti-nudity ordinance leaves abundant opportunity for self-expression through nearly nude dancing. In a like manner, the St. Paul Ordinance leaves to Petitioner ample avenues for venting any opinions he might wish without fear of transgression of bias-motivated crime legislation. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

The *Barnes* opinion stresses that any First Amendment interests implicated in a ban on nude dancing are minimal at best. While holding that " 'nude dancing is not without its First Amendment protections from official regulation' " *citing Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), the plurality opinion goes on to state that "nude dancing of the kind sought to be performed here is *expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.* This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the . . . statute is an impermissible infringement of that protected activity." *Barnes v. Glen Theater, Inc.*, —— U.S. ——, ——, 59 LW 4745, 4747 (1991) (emphasis added). The instant case is, as we have seen, similar in that respect as well.

Under the *O'Brien* test, the enactment must also be narrowly drawn to further the governmental interest without unduly impinging on protected expression. *Sable Communications of California, Inc. v. F.C.F.*, 492 U.S. 115, 125-126 (1989); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Wayte v. United States*, 470 U.S. 598, 613 (1985). *Compare Shad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (banning all live entertainment in borough not sufficiently narrowly tailored).

The enactment need not be the least intrusive alternative possible; it suffices if it is

> narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985); *see also Community for Creative Non-Violence, supra*, 468 U.S. at 297. To be sure, this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. *See Frisby v. Schultz*, 487 U.S. at ——, 108 S.Ct. at 2502 ("[a] complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil"). So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989) (footnotes omitted).

When the accused claims that his conduct is expressive, his First Amendment interests, to the extent they exist, must be balanced against competing societal interests. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 at 805-808 (1984); *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

The minimal expressive conduct of the accused here stands in stark contrast to the important and vital personal rights of victims that are vitiated by violation of the Ordinance. *See New York v. Ferber*, 458 U.S. 747 (1982) (criminal statute forbidding child pornography, even if it is not obscene, does not violate First Amendment; harm to children clearly outweighs defendant's right to express himself freely). Victims are targeted not, essentially, because of their individual attributes but simply because they are members of a particular race, religion, or gender that has historically suffered discriminatory treatment. Moreover, experts understand that by attacking a person's community, one interferes with that person's concept of self and individual growth and development.

In the instant case, the victims' right to live in peace where they wish, and where they have a constitutional right to reside, is seriously compromised. The message of the cross burner is that the targeted victim should move out of the neighborhood; the only—and brutal—message conveyed.

Frisby v. Schultz, 487 U.S. 474 (1988) recognizes that individuals who are targeted *in their homes* by one claiming a First Amendment right to approach them with an expressive message have special rights as a "captive audience." As in *Frisby*, the environs of the targeted residence are, in the instant case, clearly not a public forum. Those within the

home are a "captive audience" who can do nothing on their own—save leaving the neighborhood—to protect themselves from being an "unwilling" observer of the cross burning outside. If they come outside, they will likely be subjected to worse intimidation and harassment.

This Court has held that mere disturbance or annoyance—far less than the demonstrated harm in the instant case—justifies protecting the captive audience in its home.

As this Court concluded in *Frisby*, "[w]e have 'never intimated that the visitor could insert a foot in the door and insist on a hearing.' [*Kovacs v. Cooper*, 336 U.S. 77, 86 (1949)]. There simply is no right to force speech into the home of an unwilling listener." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulation of their daily pursuits, is surely an important value." *Carey v. Brown*, 447 U.S. 455, 471 (1969).

In a number of cases, cross burning has been the gravamen of offenses alleged under Title 18, section 241 (1990) of the United States Code which provides, in part, that it is a crime to "conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . ." Specifically, the act of the accused in these cases is claimed to have interfered with the federally guaranteed right to occupy a particular dwelling. *See, e.g., United States v. Lee*, 935 F.2d 952 (8th Cir. 1991); *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1991); *United States v. Worthy*, 915 F.2d 1514 (11th Cir. 1990); *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989).

In *Lee*, the defendant's claim that application of the law to his conduct violated his First Amendment rights was rejected by the Eighth Circuit Court of Appeals.

> We proceed on a predicate that cross burning is conduct which possesses sufficient elements of communication to implicate the first amendment. However, it does not necessarily follow that the burning of this cross was protected first amendment activity. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The relevant inquiry is whether the governmental interest in regulation is related to the suppression of free expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). If the interest is related to the suppression of expression, we must apply a heightened standard of review. *Id.* If the interest is unrelated to the suppression of expression, the more deferential *O'Brien* standard will apply. *Id.*
>
> We hold that the governmental interest supporting this regulation is unrelated to the suppression of free expression. Section 241 does not prohibit conspiracies to communicate offensive or racist messages; it does not prohibit conspiracies to simply burn a cross. Section 241 is a content neutral statute which prohibits conspiracies to threaten or intimidate others in the exercise or enjoyment of their federally guaranteed rights. As applied to the facts before us, section 241 does not prohibit Lee from conspiring to burn a cross to convey an offensive message or a message of racial hatred. *Rather, the statute prohibits Lee from conspiring to burn a cross to threaten or intimidate targeted individuals in the exercise of their federally guaranteed right to rent and occupy a dwelling* [emphasis added]. *See CISPES (Committee in Solidarity with the People of El Salvador) v. Federal Bureau of Investigation*, 770 F.2d 468, 474 (5th Cir. 1985).[3][*]

* * *

> Section 241 is intended to protect the free exercise of all rights and privileges secured by the Constitution and by all laws of the United States. *United States v. Price*, 383 U.S. 787 (1966). To the extent that the enactment of section 241 is an exercise of the power of Congress to enforce the thirteenth amendment by and through legislation, we hold that it is valid. *See* U. S. Const. amend. XIII, § 2; *cf. Williams v. Matthew Co.*, 499 F.2d 819, 825 (8th Cir. 1974) (Fair Housing Act of 1968 is also an exercise of Congress' power under the thirteenth amendment).

United States v. Lee, 935 F.2d at 954-955.

The *Lee* court, in holding "the incidental restriction on first amendment freedom is no greater than that which is essential to further the governmental interest," relied on section 241 being

> a narrowly tailored law which targets and eliminates the exact source of "evil" it seeks to remedy by requiring a strict scienter requirement. *Cf. Boos v. Barry*, 485 U.S. 312, 326 (1988) (18 U.S.C. § 112 "does not prohibit picketing; it only prohibits activity undertaken to 'intimidate, coerce, threaten or harass.' "

---

[*]

[3] In *CISPES*, the Fifth Circuit reviewed 18 U.S.C. § 112(b)(1)-(2), which makes it a crime to "intimidate, coerce, threaten or harass" a foreign official in the performance of his duties. The court concluded that § 112(b)(1)-(2) does not restrict any particular message, but rather proscribes conduct of a threatening or intimidating nature. *See also, Boos v. Barry*, 485 U.S. 312, 326 (1988) ("[Section] 112 is not narrowly directed at the content of speech but at any activity, including speech, that has the prohibited effects.").

* * *

Although persons must generally tolerate highly offensive and disturbing speech, the government may restrict such speech where it intrudes on the privacy of the home or where the degree of captivity makes it impractical for an unwilling listener or viewer to avoid exposure to the speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-11 (1975).

* * *

The jury could readily have found that Lee's conduct was tantamount to intimidation by threat of physical violence. It was not mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people.[5] Upon the record evidence, the jury could have found that the cross burning was an especially intrusive act which invaded the substantial privacy interests of its victims in an essentially intolerable manner. To protect the inhabitants of this nation from such an attack on civil rights does not violate the spirit of the first amendment.

United States v. Lee, 935 F.2d at 954-956.

---

[5] Lonetta Miller, a seventy-one year old black woman testified on cross-examination as follows:

Q: Could you tell the ladies and gentlemen of the jury what a cross burning means, whether it is in the south or anywhere else?

A: Well it is a form of intimidation; the ku klux klan uses it for threats; promises of violence, and that sort of thing.

From what I understand a lot of the cross burnings in the south during the civil rights movement preceded hangings and that sort of thing. Of course, being a black, that is what it calls to mind.

Tr. at 354.

This court's holding in *Brown v. Board of Education*, 347 U.S. 483 (1954) establishes once and for all that the right to equality owed all citizens goes beyond mere physical equality. The holding postulates that separation of black from white "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." That is, separate is inherently unequal. *Id.* at 494.

Burning of crosses, or the use of symbols of like racial, religious, or gender-related meaning, is intended to further the goal of isolating or stigmatizing persons because of the group of which they are a part. Such symbols serve their purposes not in creating, but in suppressing dialogue that could lead to reconciliation among communities.

To one who is a member of the majority, it is extremely difficult to understand the "outsider jurisprudence" that derives from considering and fully appreciating "the victim's story of the effect of racist hate messages." *See* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2321 (1989). *See also* Delgado, *Words that Wound, A Tort Action for Racial Insults*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303 (1986).

> [T]he characteristic most significant in determining the value of racial insults is that they are not intended to inform or convince the listener. Racial insults invite no discourse, and no speech in response can cure the inflicted harm.
>
> Racial insults may usefully be analogized to obscenity. Although the government may regulate obscenity, it may

> not prohibit expression of the view that obscenity should be protected or that, for example, adultery may be proper behavior. Similarly, protecting members of racial minorities from injury through racial insults, and society itself from the accumulated harms of racism, is very different from prohibiting espousal of the view that race discrimination is proper.

Delgado, *Words that Wound*, 17 Harv. C.R.-C.L. L. Rev. at 177 (footnotes omitted).

In *Salyer*, and *Skillman*, *supra*, enhanced sentences were imposed and held justified based on the fact that cross burning is directed at African American victims who are particularly susceptible or vulnerable to that criminal conduct. In *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989),

> [t]he district court reasoned, a black person is more likely than other minorities to be the victim of a cross burning, because the act has a special capacity to evoke terror among black Americans. As the district court stated:
>
> > There is a history of violence and intimidation which is directed against blacks and which is symbolized by a burning cross. That's exactly the symbol that these defendants chose to invoke and they chose to do so because that is precisely the way in which the family was most vulnerable to the threat of intimidation.

Salyer, 893 F.2d at 116 (citation omitted).

In *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1991),

> There was ample testimony to substantiate the court's finding that a black family in a predominantly [white] neighborhood is particularly susceptible to a burning

cross in the night in their front yard and that the defendant knew or should have known of this particular susceptibility.

There was particularly poignant evidence in the trial testimony and the presentence report that the Heisser family was "particularly susceptible to the criminal conduct." The trial testimony and presentence report revealed the following reaction to the burning cross. At about 4:30 a.m., the Heisser daughter was awakened by noise and an orange glow from outside her bedroom window. Peering outside the window, she saw a flaming cross on the family front lawn. She woke up her brother and told him to wake up the parents. After the mother saw the burning cross, she was crying on her knees in the living room. Upon seeing the cross, the mother felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: "Nothing good. Murder, hanging, rape, lynching. Just anything bad that you can name. It's the worst thing that could happen to a person." The presentence report also noted that "the victim's family is extremely traumatized" by the cross burning incident. Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. Mr. Heisser "stated that he felt at the time that his 'home and women' had been violated and he was powerless to take action against the unknown perpetrator." Seven months after the incident, the family still lived in fear. Mr. Heisser still awakened at night to investigate any noises. Mrs. Heisser was prescribed medication to deal with the incident and could not afford a

psychologist which her doctor recommended. She was often reduced to tears in discussing the incident and is afraid when she stays home alone.

This is a reaction reasonably to be anticipated from this criminal conduct. Skillman knew or should have known that a black family, such as the Heisser family, would be terrified and particularly susceptible to this criminal conduct.

Skillman, 922 F.2d at 1378.

The facts in *United States v. Lee*, *supra*, where the validity of the conviction, not the sentence, was at issue, also highlight the story from the victim's standpoint.

The drinking and discussion continued throughout the day. At approximately three o'clock, Werner Jahr mentioned that he had read an article about the Ku Klux Klan. He told Lee that if the Klan were there, there would be a cross burning. Jahr suggested they burn a cross and Lee agreed that it was a good idea. Lee then constructed a wooden cross. Later that afternoon, Lee told Dockter's sister that he intended to burn the cross because there were problems with the people upstairs and he was going to do something about it.

At approximately ten o'clock, Lee changed into dark clothes. There was testimony that Lee also donned a white mask. Lee then burned the cross on a small hill about 386 feet from the apartment buildings. Although the cross had been soaked with mineral spirits, it burned only briefly. Witnesses testified that Lee seemed disappointed that the cross had not burned longer.

The burning cross was seen by Pearl Jones and her family and friends from the Joneses' balcony. Pearl Jones testified that she was afraid when she saw it

because it made her think of the Ku Klux Klan—"peoples that hate blacks." Tr. at 189. Upon seeing the cross, she said "I hope they don't come up here and burn us up." Tr. at 191. She felt the cross burning was directed at her.

Lee later stated to another tenant that he had taken part in the cross burning and he knew cross burning was a symbol of the Klan. He also said he had burned the cross to take a stand and that "[m]aybe that would get rid of some of the bad blacks that were there, they would take the message seriously and leave."

Tr. at 288.

United States v. Lee, 935 F.2d at 954.

From reading Petitioner's Brief and the Briefs *Amici Curiae* filed on his behalf, one would think that violation of the St. Paul Ordinance is a victimless crime. That is not the case.

There are rights to liberty at least as basic on the side of the victim as on the side of the perpetrator of this offense. Where rights are in conflict, they must be balanced. It is Respondent's position that the minimal interest in free expression on the part of the Petitioner is far outweighed by the freedom of the victim to live where he wishes and by the right to equal treatment in the society of which he is a member.

In summation, even were the St. Paul Ordinance found to be content-biased, the vital interests of the victim constitute that compelling state interest which justifies limiting the perpetrator's conduct.

CONCLUSION

For the reasons stated, Respondent prays the Court affirm the decision of the Minnesota Supreme Court and remand the matter for prompt hearing on the merits.

Respectfully submitted,

TOM FOLEY
Ramsey County Attorney
Counsel of Record
STEVEN C. DeCOSTER
Assistant Ramsey County Attorney
Of Counsel
350 St. Peter Street, Suite 400
St. Paul, MN 55102
Telephone: (612) 292-6181
*Counsel for Respondent**

Dated: August 23, 1991

---

* Timothy S. Murphy, law clerk in the Ramsey County Attorney's Office, assisted in the preparation of this Brief.

Supreme Court, U.S.
FILED
SEP 24 1991
OFFICE OF THE CLERK

No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Minnesota

REPLY BRIEF

EDWARD J. CLEARY
Counsel of Record
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

MICHAEL F. CROMETT
Of Counsel
1708 American National
Bank Building
Saint Paul, MN 55101
(612) 227-5363

Office of the Ramsey County
Public Defender

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Argument

St. Paul City Ordinance section 292.02 is similar to other laws which this Court has said could *not* be saved by narrowing constructions given by state courts 1

I. Even narrowly construed, section 292.02 remains unconstitutionally overbroad and vague 7

II. Unlike *United States v. O'Brien* and its progeny, the governmental interest as reflected in section 292.02 is directly related to the suppression of free expression 11

Conclusion 13

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Barnes v. Glen Theatre, Inc., ___ U.S. ___, 111 S.Ct. 2456 (1991) 11, 12

Brown v. Louisiana, 383 U.S. 131 (1966) 12

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 5

City of Houston v. Hill, 482 U.S. 451 (1987) 1, 4, 6

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ... 4, 6

Gooding v. Wilson, 405 U.S. 518 (1972) 1, 2, 3

Herndon v. Lowry, 301 U.S. 242 (1937) 2

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 6

Kolender v. Lawson, 461 U.S. 352 (1983) 1, 6

Lewis v. City of New Orleans, 415 U.S. 123 (1974) ... 1, 3

Parker v. Levy, 417 U.S. 733 (1974) 6

Spence v. Washington, 418 U.S. 405 (1974) 12

Stromberg v. California, 283 U.S. 359 (1931) 12

Terminiello v. Chicago, 337 U.S. 1 (1949) 7

United States v. Eichman, 496 U.S. ___, 110 S.Ct. 2404 (1990) 12

United States v. O'Brien, 391 U.S. 367 (1968) 11, 12

FEDERAL DECISIONS:

United States v. Lee, 935 F. 2d 952, *vacated*, 935 F.2d 960 (8th Cir. 1991) 10

TABLE OF AUTHORITIES – Continued

Page

MINNESOTA DECISIONS:

In re R.A.V., 464 N.W.2d 507 (Minn. 1991) 4, 7

FEDERAL STATUTES:

18 U.S.C. § 241 (1988) 10

28 U.S.C. § 1257(a) (1988) 2

ORDINANCES:

St. Paul, Minn., Ordinances ch. 292, § 292.02 (1990) .*passim*

St. Paul, Minn., Ordinances ch. 56, § 56.01 (1956) 12

OTHER SOURCES:

Gard, *Fighting Words and Free Speech*, 58 Wash. U.L.Q. 531 (1980) 5

Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) 4

LaFave, *Substantive Criminal Law*, § 3.4 (a), (c) (2d ed. 1986) 9

Strossen, *Regulating Racist Speech On Campus: A Modest Proposal*, 1990 Duke L. J. 484 6

ARGUMENT

ST. PAUL CITY ORDINANCE SECTION 292.02 IS SIMILAR TO OTHER LAWS WHICH THIS COURT HAS SAID COULD *NOT* BE SAVED BY NARROWING CONSTRUCTIONS GIVEN BY STATE COURTS.

Invoking federalist precepts, Respondent emphasizes the authoritative nature of a state's highest court's interpretation of its laws. In doing so, Respondent seeks to narrow and close off review by this Court. Criticizing the Court's opinions, Respondent attempts to distinguish decisions that hold that a law may be so substantially overbroad that it cannot be narrowly construed in a successful manner by a lower court. Thus, Respondent contends that in *Lewis v. City of New Orleans*, 415 U.S. 123 (1974), this Court "ignored" the state court's decision and in *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court "seized" on earlier decisions. In *City of Houston v. Hill*, 482 U.S. 451 (1987), Respondent notes only that the "fighting words" doctrine was not overruled outright. (Resp. Br. at 18).[1] Finally the Respondent fails to address *Kolender v. Lawson*, 461 U.S. 352 (1983), where this court rejected the state of California's attempt to narrowly construe an unconstitutionally vague loitering statute.

Respondent also engages in a tautology by suggesting (a) this Court's review of the ordinance is limited to a review of the narrow construction of the Minnesota Supreme Court and (b) since that court narrowed the ordinance to "fighting words," which describe "illegal conduct", section 292.02 survives constitutional analysis.

---

[1] "Resp. Br." refers to Brief of Respondent.

Carried to its logical conclusion, this type of circular reasoning could result in a lower court saving any overbroad or vague speech-regulating provision by "construing" the law in question to outlaw only that speech not protected by the First Amendment. Clearly such an interpretation would undermine the jurisdiction of this Court and could lead to widespread regional abuse of the First Amendment. State legislatures effectively would be given authority to enact overbroad laws aimed at unpopular minorities since state courts could avoid constitutional review by engaging in supposed "saving" narrow constructions.

The final determination of whether a law is repugnant to the Constitution of the United States, whether as written or as construed, remains exclusively with this Court. 28 U.S.C. § 1257 (a) (1988). In *Gooding v. Wilson, supra* at 520, the Court noted that even *after* being narrowly construed by the lower court, the law must punish only unprotected speech and not be susceptible to application to protected expression. This Court rejected the argument, now being raised by the Respondent, that since the lower court narrowed the law in question to "fighting words" only unprotected speech was prohibited and the constitutional inquiry was at an end. Finding that the court had not truly narrowed the application of the law to "fighting words", this Court noted that the lower court's interpretation left a broad standard that effectively "licenses the jury to create its own standard in each case." Such a standard meant that the narrowly construed law had not been construed "so as to avoid all constitutional difficulties". *Gooding v. Wilson, supra* at 528 (citing *Herndon v. Lowry*, 301 U.S. 242, 263 (1937)).

Lewis v. City of New Orleans, 415 U.S. 123 (1974), also exemplifies the failure of a lower court to save a defective law in the face of a constitutional challenge of overbreadth and vagueness. Upon remand from this Court, the court stated that the law applied to "fighting words uttered to specific persons at a specific time. . . . " *Id.* at 131.[2] While appearing to have narrowly construed the law, the lower court demonstrated that it intended a much broader scope of the law, to reach |" . . . the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty. . . . " *Id.* at 132. This Court noted that it found "nothing in the opinion of the [state court] that makes any meaningful attempt to limit or properly define" the terms of the ordinance. *Id.* at 133.

Respondent disregards the implications of this Court's decisions in *Lewis* and *Gooding*. Like the lower courts in those cases, the Minnesota Supreme Court sought to narrowly construe the law while revealing a scope far broader than that permitted by such a narrow construction. The language of the decision demonstrates that the ordinance reaches far beyond mere "fighting words" or "imminent lawless action" and makes it clear that all cross burnings should be, and would be, prohibited by this ordinance.

> The burning cross is itself an unmistakable symbol of violence and hatred based on virulent

---

[2] These limitations parallel Respondent's analysis of the narrow construction of section 292.02. (Resp. Br. at 5). In *Lewis* this type of limitation was insufficient to save the law.

notions of racial supremacy.* It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

---

*See, Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2365-66 (1989): "There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the klan robes, the burning cross are examples. . . . "

In re R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

This broad language used by the court at the outset of its opinion cites three examples of symbolic speech that under any circumstances constitute "fighting words" or "imminent lawless action." Respondent adopts this reasoning in its argument. (Resp. Br. at 19, 20).

Other decisions of this Court indicate that there are some laws which are so substantially overbroad that they are constitutionally impermissible with or without a narrow interpretation by a lower court. In *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court struck down an ordinance, even though the state court had not had the chance to construe it, because the ordinance was not susceptible to a limiting construction. In *Erznoznik v. City of Jacksonville*, 422 U.S. 204 (1975), the lower court did not attempt to narrowly construe a public nuisance law by limiting the reach of the ordinance to movies that are obscene to minors, " . . . perhaps because a rewriting of the ordinance would be necessary to reach that result". *Id.* at 216 n.15.

The lower court's attempt to incorporate the "fighting words" doctrine into this content-based provision is inconsistent with the " . . . fundamental First Amendment principle that ideological outrage at the content of a communication is an inadequate predicate to the application of the fighting words doctrine." Gard, *Fighting Words As Free Speech*, 58 Wash. U.L.Q. 531, 546 (1980). Indeed, "[i]n a democratic society even the most odious ideas must be afforded constitutional protection if the society is to retain its essential characteristic of popular self-governance. The possibility that an addressee's justifiable outrage at the content of the ideas expressed may be manifested by unlawful violence cannot be permitted to sanction a different result." *Id.* at 547-48. The fighting words doctrine, within the context of the surrounding language of section 292.02, is particularly dangerous because it may suppress a great deal of expressive behavior.

> A strictly limited fighting words concept is consistent with the views of Zechariah Chafee, whose writings provided the definition of "fighting words" that the Court adopted in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. See, Z. Chafee, *Free Speech in the United States*, 151, 152 (1941). In the same book, shortly after the passage proposing this definition, Chafee qualified his account of fighting words: "This breach of peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self control . . . Thus . . . these crimes of injurious words must be kept within very narrow limits if they

> are not to give excessive opportunities for outlawing heterodox ideas."

Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 Duke L.J, 484, 509-10 n. 126.

The attempt to narrowly construe section 292.02 also results in vagueness. As this Court has noted, there is more to the vagueness doctrine than a notice requirement. In *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court outlined the requirement that a legislature establish minimal guidelines to govern law enforcement. *Id.* at 358. The Court distinguished *Parker v. Levy*, 417 U.S. 733 (1974), "because of the factors differentiating military society from civilian society" and *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), since "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow". *Kolender v. Lawson, supra* at 359 n. 8.

It is not enough for a court simply to construe a law narrowly, the court must comply with constitutional principles in doing so. Without this qualification, any ordinance, statute, or law could be saved by mere reference to a category of speech or expressive conduct which falls "outside the protection of the First Amendment". Without this limitation, the ordinance in *Hill* could have successfully been construed to reach only "fighting words" and the law in *Erznoznik* could have been saved by a construction that "narrowed it" to "obscenity". The argument of Respondent, that a substantially overbroad law can be saved through a general reference to "expressions . . . which the First Amendment does not protect,"

In re R.A.V., 464 N.W.2d 507, 511 (Minn. 1991), is circular and cannot withstand constitutional analysis.

I.

EVEN NARROWLY CONSTRUED, SECTION 292.02 REMAINS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

Accepted principles of constitutional law and judicial review require this Court to review the law as construed by the state's highest court. In other words, the construction of the lower court should be reviewed by this Court "as though the precise words had been written into this ordinance." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Under this standard, as construed by the state court, St. Paul, Minn., Ordinances, ch. 292, § 292.02 (1990) would provide:

> Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know (constitutes fighting words or imminent lawless action) on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Even with this narrowing language, the ordinance retains most of its overbreadth and results in impermissible vagueness as well. Section 292.02 continues to address all forums, proscribes both symbolic and written expression, prohibits specific symbols reflecting continued viewpoint discrimination, retains an overbroad scienter

provision and fails to limit the ever expanding list of aggrieved classifications.

Petitioner has not misconstrued what constitutes a "public forum". (Resp. Br. at 25). In fact, the very kinds of expression referred to as "core political expression" by the Respondent are addressed by section 292.02. Petitioner agrees with Respondent that picketing, marching, and political demonstration "lie at the heart of public expression." (Resp. Br. at 25). There are many public arenas within the city of St. Paul, including the steps of the State Capitol, which by tradition have been used as forums for free expression. This ordinance, even as *narrowly construed,* continues to chill core political expression since symbolic or written conduct *could* fall under the prohibition of "fighting words" or "imminent lawless action". A demonstration of opposing political viewpoints in a designated public forum regarding an emotional issue could easily result in accusations that certain expressions constitute "fighting words." One need only consider the possibility of politically motivated accusations at a pro-life or pro-choice demonstration resulting in the enforcement of the ordinance.

Respondent (and *Amici*) misstate the scienter requirement under section 292.02, both as written and as construed. Respondent repeatedly refers to the scienter "requirement" of section 292.02, (Resp. Br. at 5, 8, 9, 14, 15, 16), and even refers to this scienter as "carefully limited" and as a "critical limitation." (Resp. Br. at 5, 15). Respondent's restrictive analysis of the scienter requirement of section 292.02 results in an improper interpretation of the language of the ordinance, as written *or* as construed.

The scienter requirement of section 292.02 provides that one can be charged with a crime when he or she "knows or has reasonable grounds to know" that his or her (expressive conduct) (arouses anger, alarm, or resentment in others) (or constitutes fighting words or imminent lawless action) on the basis of race, color, creed, religion or gender." St. Paul, Minn., Ordinances, ch. 292, § 292.02 (1990).

The *mens rea* requirement in statutory crimes can be characterized as requiring subjective fault, objective fault, or strict fault. Crimes with a requirement of "intent" or "knowledge" involve subjective fault. Crimes with scienter of "having reason to know" involve objective fault. The disjunctive "or" between the scienter requirement of "knows" or "has reasonable grounds to know" in section 292.02 results in a broad objective standard of guilt similar to a negligence standard. LaFave, *Substantive Criminal Law,* § 3.4 (a) at 298 (2d ed. 1986). The objective fault lies in creating an "unreasonable risk" and the actor need not realize the risk in order to be negligent. No subjective fault is required under this portion of the scienter provision. *Id.* § 3.4 (c) at 300.

The scienter requirement under this section as written and as construed is far from "carefully limited". The practical effect of this broad scienter provision is an impermissible restriction on the content of the message conveyed by the expressive conduct. It is not necessary to prove that the accused knew or intended to create "fighting words". Nor is there a requirement in the ordinance, as written or as construed, that the expressive conduct must "threaten harm to others." (Resp. Br. at 20). Rather

the political expression is subject to a negligence standard, allowing an audience to determine what expression is permitted based on its agreement or disagreement with the content of the message. This gives an audience the ability to censor the expression of an opposing viewpoint under the guise of a "fighting words" characterization. The Minnesota Supreme Court's narrowing construction of the ordinance fails to limit this scienter provision. This construction creates vagueness, subjects the law to selective enforcement, and fails to reduce the chilling effect of the ordinance.

Respondent relies extensively on *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991). (Resp. Br. at 33-36, 40-41). The opinion and judgment of that court was vacated and petition for rehearing en banc was granted on August 14, 1991. *Id.* at 960. The provision at issue in that case is Title 18, section 241 of the United States Code. That section does not prohibit the burning of a cross but demands a "specific intent" to threaten or intimidate another in the exercise or enjoyment of a federally guaranteed right. The vacated opinion held that that law was content neutral and did not reach a substantial amount of constitutionally protected conduct. Whether or not that decision is later affirmed, section 241 is easily distinguishable from section 292.02.

The substantial overbreadth of section 292.02 endures even after the lower court's narrowing construction. Vagueness remains regarding precisely what constitutes "fighting words" and "imminent lawless action" within the context of the content-based and viewpoint discriminatory ordinance.

II.

UNLIKE *UNITED STATES V. O'BRIEN* AND ITS PROGENY, THE GOVERNMENTAL INTEREST AS REFLECTED IN SECTION 292.02 IS DIRECTLY RELATED TO THE SUPPRESSION OF FREE EXPRESSION.

Respondent inexplicably refers to the ordinance as "content-neutral," "carefully tailored" and furthering a "compelling state interest." These references implicitly recognize that, whether as written or as narrowly construed, the *entire* ordinance must be analyzed. Instead of applying the appropriate content-based test to this type of law, however, Respondent relies on *United States v. O'Brien*, 391 U.S. 367 (1968). (Resp. Br. at 28).

Section 292.02 proscribes symbolic and written expression. It is directly aimed at the communicative impact of the expressive conduct which is proscribed. The governmental interest reflected in section 292.02 is directly related to the suppression of the message conveyed. The government may not proscribe particular conduct because it has expressive elements. Nor is section 292.02 a general law regulating conduct without specifically targeting expression. Thus section 292.02 is distinguishable from laws regulating conduct without reference to the content of the expression, as in *United States v. O'Brien*, 391 U.S. 367 (1968) and in *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456 (1991). Both the law in *O'Brien* (protecting the existence of selective service cards for national defense purposes) and the law in *Barnes* (proscribing all public nudity) involved governmental interests that this Court found were not directly related to the suppression of free expression. An open-burning law

prohibiting all public burning, regardless of what is being burned, is more analogous to the laws in *O'Brien* and *Barnes*. *See e.g.*, St. Paul, Minn., Ordinances, ch. 56, § 56.01(a) (1956). Under such a law it is the *conduct* of burning in public that is proscribed not the *content* of the message conveyed. Where a law prohibits conduct *because* of its communicative impact, however, this Court has held such laws unconstitutional. *See e.g., United States v. Eichman*, 496 U.S. ___, 110 S. Ct. 2404 (1990); *Spence v. Washington*, 418 U.S. 405 (1974); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Stromberg v. California*, 283 U.S. 359 (1931).

More than half of the states have adopted hate-crime statutes while a number of other states have specifically prohibited cross burning. (*See* Brief of *Amicus* ADL p. 4, A1-A7, B1-B2). The vast majority of the laws referred to as "hate crime" laws are enhancement provisions which apply to existing crimes and enhance the sentence or the class of crime based on the bias motive. These laws are thoroughly distinguishable from section 292.02 since this ordinance creates a separate crime without reference to the enhancement of an existing crime. Among laws cited which specifically address cross burning, the majority of the states usually allow the display of such symbols on private property with a written consent or authorization by the property owner. In order to violate the majority of these laws, one must be found to have *intended* to either *intimidate* or *terrorize* another person. Thus the forums addressed are narrower than those addressed in section 292.02 and the element of scienter requires proof of actual intent.

Various interests are offered in support of section 292.02. While social equality and the elimination of racial

and gender violence are essential social goals, this ordinance is not a constitutionally permissible method of reaching these objectives. It is overbroad and viewpoint discriminatory as written. It is overbroad, viewpoint discriminatory and vague as "narrowly construed". It is disingenuous at best for Respondent to accuse Petitioner of suggesting that violation of section 292.02 is a victimless crime. (Resp. Br. at 41). Petitioner has never suggested that general penal laws would not be applicable to the alleged fact situation. Law enforcement officials can and should vigorously enforce the general criminal code fully and effectively when a crime has been committed. They should not, however, be entrusted with the enforcement of a content-based provision that severely encroaches upon the freedom to express one's personal beliefs, popular or unpopular.

For two centuries, the First Amendment freedom of speech clause has been the one individual right that has distinguished this nation from all others. Freedom of expression is the cornerstone of our form of government and it has withstood attacks from all sides of the political spectrum. As the Bill of Rights enters its third century, we must not allow this Amendment to be diminished in the manner suggested by the Respondent.

CONCLUSION

The judgment of the Supreme Court of Minnesota upholding the constitutionality of St. Paul City Ordinance section 292.02 should be reversed and section 292.02

should be held unconstitutional in violation of the First Amendment to the United States Constitution.

Respectfully submitted,

/s/ Edward J. Cleary
EDWARD J. CLEARY
Counsel of Record
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

/s/ Michael F. Cromett
MICHAEL F. CROMETT
Of Counsel
1708 American National
Bank Building
Saint Paul, MN 55101
(612) 227-5363

Counsel for Petitioner

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R.A.V.,
Petitioner,

v.

ST. PAUL, MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL P. McDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041

GARY B. BORN
Counsel of Record
STUART P. GREEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Amicus Curiae Center for Individual Rights

July 25, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. ST. PAUL'S BIAS-MOTIVATED DISORDERLY CONDUCT ORDINANCE IS A CONTENT-BASED RESTRICTION ON EXPRESSIVE CONDUCT	6
II. THE CONTENT-BASED RESTRICTIONS IMPOSED BY ST. PAUL'S ORDINANCE DEMAND THE MOST EXACTING JUDICIAL SCRUTINY	10
III. THE ST. PAUL ANTI-BIAS ORDINANCE DOES NOT SURVIVE STRICT SCRUTINY ANALYSIS	17
A. The State's Interest in Prohibiting the Use of Bias-Motivated Symbols in Order to Maintain Public Order Is Neither Implicated Nor Compelling in This Case	18
B. The St. Paul Ordinance May Not Constitutionally Prohibit the Ideas That Accompany Certain "Fighting Words"	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases — Page

American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) 21
Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 9, 10, 12
Boos v. Barry, 485 U.S. 312 (1988) 8, 17, 19
Brandenburg v. Ohio, 395 U.S. 444 (1969) 3
Brown v. Louisiana, 383 U.S. 131 (1966) 6
Brown v. Oklahoma, 408 U.S. 914 (1972) 15
Carey v. Brown, 447 U.S. 455 (1980) 7, 9, 10, 11
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ..... *passim*
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 8
Cohen v. California, 403 U.S. 15 (1971) 14
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 8, 14, 17, 19
Cox v. Louisiana, 379 U.S. 536 (1965) 4, 11, 12, 20
Debs v. United States, 249 U.S. 211 (1919) 22
Eaton v. City of Tulsa, 415 U.S. 697 (1974) 15
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 5, 7, 12, 19
First National Bank v. Bellotti, 435 U.S. 765 (1978) 4, 10, 21
Fowler v. Rhode Island, 345 U.S. 67 (1953) 14
Gooding v. Wilson, 405 U.S. 518 (1972) 15
Grosjean v. American Press Co., 297 U.S. 233 (1936) 12
Hess v. Indiana, 414 U.S. 105 (1973) 15
Houston v. Hill, 482 U.S. 451 (1987) 18
In re S.L.J., 263 N.W.2d 412 (Minn. 1978) 5, 18
Karlan v. City of Cincinnati, 416 U.S. 924 (1974) 15
Kelly v. Ohio, 416 U.S. 923 (1974) 15
Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991) 4, 13
Lewis v. New Orleans, 408 U.S. 913 (1972) 15
Linmark Associates v. Willingboro, 431 U.S. 85 (1977) 21

TABLE OF AUTHORITIES—Continued

Page

Lucas v. Arkansas, 416 U.S. 919 (1974) 15
Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 10
Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) 12
Niemotko v. Maryland, 340 U.S. 268 (1951) 14
Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973) 11, 12
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 667 (1973) 10
Police Department v. Mosley, 408 U.S. 92 (1972) ..... *passim*
R.A.V., Matter of Welfare of, 464 N.W.2d 507 (Minn. 1991) ..... *passim*
Rosen v. California, 416 U.S. 924 (1974) 15
Rosenfeld v. New Jersey, 408 U.S. 901 (1972) 15
Schenck v. United States, 249 U.S. 47 (1919) 22
Spence v. Washington, 418 U.S. 405 (1974) 6
Stromberg v. California, 283 U.S. 359 (1931) 6
Terminiello v. Chicago, 337 U.S. 1 (1949) 21
Texas v. Johnson, 491 U.S. 397 (1989) ..... *passim*
Thornhill v. Alabama, 310 U.S. 88 (1940) 22
Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605 (1979) 15
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 21, 22
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 5, 6, 17, 21
Widmar v. Vincent, 454 U.S. 263 (1981) 4, 10
Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 19

Constitutional and Statutory Provisions

U.S. Const. amend. I ..... *passim*
Minn. Stat. Ann. § 609.72, Subd. 1(3) (1990) 5, 18
St. Paul, Minn., Ordinance § 292.02 (1990) 3, 7

TABLE OF AUTHORITIES—Continued

Articles	Page
Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 533 (1980)	15
Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989)	8
Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1 (1975)	15
Miscellaneous	
Letter from Gerald Gunther to George Parker (May 1, 1989) *reprinted in* STAN. UNIV. CAMPUS REP., May 3, 1989	15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-7675

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner, R.A.V. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTERESTS OF *AMICUS CURIAE*

The Center for Individual Rights ("CIR") is a non-profit public interest law firm. CIR was founded in 1989 to provide free legal representation to deserving clients who cannot otherwise afford to obtain legal counsel. Through its litigation activities, CIR seeks to advance respect for individual rights, including both civil and

economic liberties, adherence to the rule of law, and the preservation of a government of limited powers.

A large number of CIR's cases have involved the First Amendment. *See, e.g., Levin v. Harleston*, 752 F. Supp. 620 (S.D.N.Y. 1990); *Iota Xi Chapter, Sigma Chi Fraternity v. George Mason University*, Civ. No. 9-785-A (E.D. Va. 1991); *Rosenberger v. Rector and Visitors of the University of Virginia*, Civ. No. 91-0036-C (W.D. Va. 1991). CIR is one of the few public interest firms to regularly represent students, college newspaper editors and professors whose First Amendment rights are infringed by academic administrators.

CIR believes that, in recent years, governmental entities and courts have increasingly circumscribed fundamental First Amendment freedoms in the pursuit of political objectives such as social justice, fairness, or sensitivity. This case is another example of such limitations on First Amendment freedoms. CIR believes that the Court's decision in this case could have far-reaching effects on cases involving governmental bans on speech that is deemed offensive on grounds of race, religion, gender or political viewpoint. These cases are the core of CIR's legal practice. Because of its significant experience in litigating cases involving these issues, CIR is well situated to brief this Court on the importance of issues beyond the immediate concern of the parties.

STATEMENT OF THE CASE

This case arises from crude and repugnant conduct. Petitioner is accused of having burned a cross inside the fenced yard of an African-American family's house. If the City's charges are proven, petitioner will be subject to prosecution for crimes such as trespass and arson.

This case does not concern these crimes. Instead, it concerns the power of the City of St. Paul to criminally punish petitioner under a municipal "bias-motivated disorderly conduct ordinance." *Matter of Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991); *see* St. Paul, Minn., Ordinance § 292.02 (1990). As drafted, that ordinance makes it a misdemeanor to display "a symbol, object, appellation, characterization or graffiti," that one knows or "has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V.*, at 508.

After the trial court struck down the anti-bias ordinance on First Amendment grounds, the City of St. Paul appealed, urging that the anti-bias ordinance be narrowly construed to reach only conduct unprotected by the First Amendment. The Minnesota Supreme Court agreed, and held the ordinance applicable only to displays that amount to "fighting words" or incitement to imminent violence, *R.A.V.*, 464 N.W.2d at 510 (*quoting Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The Court also summarily concluded that "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order," *id.* at 511, and thus the ordinance survived First Amendment scrutiny.

SUMMARY OF ARGUMENT

1. St. Paul's bias-motivated disorderly conduct ordinance is plainly a content-based restriction on expressive conduct. The ordinance applies only to a limited category of symbols that "arouse[] anger, alarm, or resentment in others *on the basis of race, color, creed, religion or gender*," St. Paul, Minn., Ordinance § 292.02 (1990) (emphasis added); it does not apply to symbols that either do not offend, or that offend based on other grounds —for example, personal characterisitcs, politics, economic or class status, or sexual preference.

Indeed, the St. Paul ordinance does not merely restrict the *subject matter* of expressive conduct, but also bans

the use of symbols that express a particular *viewpoint*. As interpreted by the Minnesota Supreme Court, the ordinance appears targeted only at some symbols that offend on the basis of race, religion, and gender—namely, those that express messages of racial hatred, religious intolerance and gender inequality, and not symbols of harmony or equality. *R.A.V.*, 464 N.W.2d at 508, 511.

2. Because St. Paul's anti-bias ordinance prohibits expressive conduct based upon its content, it is subject to the strictest judicial scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978). Indeed, viewpoint-based restrictions like the St. Paul ordinance are virtually never permitted under the First Amendment. The level of judicial scrutiny demanded by the First Amendment is not affected by the fact that St. Paul's ordinance has been interpreted by the Minnesota Supreme Court to apply only to "fighting words." Even assuming that a State may forbid *all* fighting words, restrictions that single out *some* fighting words because they express a proscribed message are subject to the strict scrutiny applicable to other content-based restrictions. Justice Black's classic concurring opinion in *Cox v. Louisiana*, 379 U.S. 536, 581 (1965), states the rule concisely:

> I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. . . . But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. . . . This seems to me to be censorship in a most odious form.

See also Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991).

It is no answer to say that St. Paul's anti-bias ordinance does not distort the marketplace of ideas because fighting words are "no essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572

(1942). Quite apart from the skepticism expressed by commentators and this Court about *Chaplinsky*'s dictum, Minnesota is seeking to punish petitioner precisely *because* he expressed ideas—specifically, "virulent notions of racial supremacy." *R.A.V.*, 464 N.W.2d at 508. Moreover, this Court has long recognized that symbols are "a primitive but effective way of communicating ideas." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634 (1943). Because it criminalizes expressive conduct that communicates a particular idea, St. Paul's ordinance is subject to the strictest judicial scrutiny.

3. Neither of the two interests that might possibly be served by St. Paul's anti-bias ordinance withstands strict scrutiny. First, the State cannot assert a compelling interest in forbidding the use of bias-motivated symbols in order to maintain public order because it already possesses a content-neutral law prohibiting all "fighting words," Minn. Stat. Ann. § 609.72, Subd. 1(3) (1990) (construed in *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978)). *See Texas v. Johnson*, 491 U.S. 397, 410 (1989). Moreover, even if the State's interest in preserving public order were implicated, the anti-bias ordinance would be inadequately tailored to achieve that end because it bans only a limited category of "fighting symbols." The selective treatment of symbols in the present case is analogous to *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), where this Court held that an ordinance forbidding drive-in theaters from showing movies involving nudity was an underinclusive means of preventing traffic hazards: other movies, not involving nudity, could also create traffic hazards but were not prohibited.

Second, the anti-bias ordinance cannot be defended on the ground that the State has a compelling interest in banning messages of racial and religious bigotry and intolerance. Although these messages are inconsistent with this Nation's highest aspirations, this Court has repeatedly held that the First Amendment does not permit a State to prohibit the communication of ideas simply because

they are offensive or at odds with national policies. As Justice Jackson said in *West Virginia Board of Education v. Barnette*, 319 U.S. at 642, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." The State may no more punish petitioner's cross-burning because of the idea he conveyed by his act than it could forbid the publication of books or sermons expressing that idea.

ARGUMENT

I. ST. PAUL'S BIAS-MOTIVATED DISORDERLY CONDUCT ORDINANCE IS A CONTENT-BASED RESTRICTION ON EXPRESSIVE CONDUCT.

St. Paul's bias-motivated disorderly conduct ordinance is a content-based restriction on expressive conduct.[1] As we show below, the ordinance is content-based because it is

[1] Petitioner's challenged conduct in this case was not his spoken or written words; rather, it was his "participat[ion] in burning a cross inside the fenced yard of an African-American family's home." 464 N.W.2d at 508. The issue, however, is whether an "intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Applying this test, the Court has held the First Amendment applicable to sit-ins protesting segregation, *Brown v. Louisiana*, 383 U.S. 131 (1966), burning the American flag, *Texas v. Johnson*, 491 U.S. 397 (1989), and displaying a red flag, *Stromberg v. California*, 283 U.S. 359 (1931). The State concedes that petitioner's cross-burning clearly falls within the category of expressive conduct. *See* Appellant's Brief at 16, *Matter of Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991) (No. C8-90-1656) ("The State agreed that the act of cross-burning was 'expression' in the sense that a message was intended to be conveyed."). The State's concession was clearly correct: petitioner is not accused because of his trespass, his arson or his other misconduct, but because of the message conveyed by the symbols he used.

"the content of the [petitioner's] speech that determines whether it is within or without" the regulation's prohibition. *Carey v. Brown*, 447 U.S. 455, 462 (1980).[2]

The St. Paul ordinance applies only to a limited category of symbols with a proscribed content: specifically, the ordinance bans symbols which one knows or has reasonable grounds to know will "arouse[] anger, alarm, or resentment in others *on the basis of race, color, creed, religion or gender*." St. Paul, Minn., Ordinance § 292.02 (1990) (emphasis added). Thus, the regulation forbids the use of symbols with some contents (ones that offend based on race, religion or gender), but not others (symbols that either do not offend, or that offend based on other grounds —for example, personal characteristics, politics, economic or class status, or sexual preference). A more explicit regulatory distinction on the basis of content would be difficult to posit.[3]

The Minnesota Supreme Court's opinion confirms that the St. Paul ordinance is a content-based restriction. That Court defended the ordinance by declaring that petitioner's "burning cross is . . . an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy" and that "[i]t is the responsibility . . . of diverse communities to confront such notions in whatever form they appear." *R.A.V.*, 464 N.W.2d at 508. Similarly, the Minnesota Supreme Court's opinion quotes with approval a law review article that observes how "certain symbols and regalia," like swastikas and burning crosses, should be prohibited because they "*carry a clear message*

[2] *See also Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 215 (1975).

[3] Indeed, the St. Paul ordinance specifically identifies two symbols—the burning cross and the swastika—whose content automatically render the regulation applicable. *R.A.V.*, 464 N.W.2d at 508.

of racial supremacy, hatred, persecution, and degradation of certain groups." [4]

Thus, it is clear that the St. Paul ordinance distinguishes between symbols based squarely on the messages they communicate: if the symbol conveys a message that may provoke violence because of its racial, religious or gender content, then it is prohibited. The restriction at issue in this case is therefore analogous to the restriction struck down in *Mosley*, where "[t]he operative distinction [was] the message on a picket sign," 408 U.S. at 95, and *Texas v. Johnson*, where Texas' flag-protection law "depended on the likely communicative impact of [petitioner's] expressive conduct." 491 U.S. at 411.[5]

Indeed, the St. Paul ordinance is not merely a restriction on the *subject matter* of expressive conduct.[6] As interpreted by the Minnesota Supreme Court, the ordinance

---

[4] Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365-66 (1989) (emphasis added).

[5] It cannot seriously be contended that the St. Paul ordinance is intended only to prevent public violence and other "secondary effects" within the meaning of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (upholding ordinance that prohibited adult movie theaters from locating within 1,000 feet of residential zones, schools, parks, or churches, because ordinance was justified without reference to the content of the regulated speech, but was instead aimed at the "secondary effects of such theaters on the surrounding community") (emphasis omitted). As this Court made clear in *Boos v. Barry*, 485 U.S. 312, 321 (1988), "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."

[6] This Court has, of course, repeatedly held that subject-matter prohibitions constitute content-based restrictions for First Amendment purposes. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion

apparently forbids expressive conduct based upon the *viewpoint* expressed by the actor on certain subjects. Thus, the ordinance is termed the "*bias-motivated* disorderly conduct" ordinance, *R.A.V.*, 464 N.W.2d at 509 (emphasis added), and is directed only at bias-motivated "expressions of hatred." *Id.* at 511. Importantly, symbols of religious harmony apparently are not reached by the regulation, nor are symbols of racial or gender equality or pride.[7] Instead, according to the Minnesota Supreme Court, the ordinance singles out only those symbols dealing with these subjects if they express "notions of racial supremacy," *R.A.V.*, 464 N.W.2d at 508, religious persecution or intolerance, or gender degradation. These are ugly and brutal ideas, deserving the deepest contempt. But they are nonetheless viewpoints on the subjects of racial, religious and gender relations, and the selective prohibition of the St. Paul ordinance is therefore a viewpoint-based restriction.

---

of an entire topic"); *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (invalidating Arkansas scheme that taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals); *Carey*, 447 U.S. at 462 n.6 ("It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message."); *Police Dep't v. Mosley*, 408 U.S. at 95 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[7] Under the Minnesota Supreme Court's interpretation of St. Paul's anti-bias ordinance, that regulation presumably would not reach symbols of racial and religious tolerance and harmony—for example, symbols of the Reverend Jesse Jackson's Rainbow Coalition or symbols that represented inter-faith or inter-racial marriages—even when used in circumstances where particular audiences might react with anger or violence. Likewise, symbols of religious and racial pride (but not supremacy or exclusivity)—perhaps a photograph of the Ayatollah Khomeini—could even more readily provoke anger or violence, but would not appear to be caught by the anti-bias regulation.

II. THE CONTENT-BASED RESTRICTIONS IMPOSED BY ST. PAUL'S ORDINANCE DEMAND THE MOST EXACTING JUDICIAL SCRUTINY.

This Court has repeatedly held that "cases in which a State undertakes to regulate speech on the basis of its content" require the "most exacting scrutiny." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *see Carey*, 447 U.S. at 464. Under this standard, the State must demonstrate that its regulation is the least restrictive means to accomplish a "compelling" governmental objective. *See First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1982). Moreover, where viewpoint-based restrictions are involved, even the most compelling state interest will ordinarily be insufficient to sustain the law. "The general principle . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." [8]

The fact that the St. Paul ordinance has been interpreted by the Minnesota Supreme Court to apply only to "fighting words" does not diminish the level of judicial scrutiny demanded by the First Amendment. Even assuming that *Chaplinsky* may be read broadly to prohibit all "fighting words," [9] a State may not choose to forbid only those "fighting words" with a particular content or message. On the contrary, even where a state has the power to forbid speech under a content-neutral prohibition, this Court has consistently subjected content-based

[8] *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

[9] As discussed below, there are compelling reasons to view the "fighting words" doctrine narrowly, particularly in the context of speech or expressive conduct concerning issues of general public importance. *See* pp. 15-16 *infra*.

restrictions on particular subcategories of such speech to the strictest scrutiny.

For example, it was assumed in *Cox v. Louisiana* that a State may prohibit all picketing in certain areas, but the Court nonetheless held that a State may not permit picketing related to specific issues (such as labor disputes) while banning all other picketing unless that distinction serves a compelling state interest. Justice Black made this point in his concurring opinion:

> This Louisiana law opens the streets for union assembly, picketing, and public advocacy, while denying that opportunity to groups protesting against racial discrimination. . . . I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. . . . But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may or may not discuss. This seems to me to be censorship in a most odious form.

379 U.S. at 580-81.[10]

Similarly, in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), this Court strictly scrutinized university regulations regarding distribution of a campus publication because such regulations turned on the "*content* of the newspaper rather than the time, place, or manner of its distribution." *Id.* at 670 (emphasis in original). Striking down the regulations, the Court expressly noted that it had "repeatedly ap-

[10] *See also Police Dep't v. Mosley*, 408 U.S. 92 (1972) (holding that a Chicago ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it impermissibly distinguished between labor picketing and all other peaceful picketing); *Carey v. Brown*, 447 U.S. 455 (1980) (holding unconstitutional a similar Illinois statute).

proved" of "time, place or manner" regulations that would have prohibited the speech in question, precisely because such regulations were applied across the board, without reference to the content of the speech that they regulated.

Likewise, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court indicated that a State could require drive-in movie theaters to screen their offerings from the view of passing motorists. *Id.* at 215 n.13. But the Court nonetheless invalidated a content-based prohibition against the display of films involving nudity at drive-ins after subjecting the ordinance to strict scrutiny.

Finally, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court struck down an Arkansas magazine tax that exempted religious, professional, trade, and sports magazines printed and published in the state. The Court noted that Arkansas could constitutionally apply a nondiscriminatory tax on all magazines.[11] However, because the tax before the Court discriminated between magazines based upon their content, "the State [had to] show that its regulation was necessary to serve a compelling state interest and [was] narrowly drawn to achieve that end." [12]

The same rule applies to St. Paul's selective prohibition against some fighting words. St. Paul could constitutionally prohibit all fighting words—just as Louisiana could have banned all picketing in *Cox*, just as the University of Missouri could have restricted the distribution of all campus publications in *Papish*, and just as Arkansas could have imposed uniform taxes on all publications in *Ragland*. But, just as strict judicial scrutiny was required when Louisiana, the University of Missouri, and Arkansas adopted narrower, content-based restrictions, St. Paul must also satisfy a strict scrutiny standard if it wishes to prohibit only those fighting words dealing with proscribed subjects.

[11] 481 U.S. at 229. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-87 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

[12] *Id.* at 231.

Judge Posner recently adopted precisely this analysis in a case involving a Wisconsin obscenity statute. He reasoned that, although under existing Supreme Court precedents the State could clearly forbid all obscenity, a content-based prohibition against only some types of obscenity would be subject to the highest level of First Amendment scrutiny:

> It is easy to imagine a statute that would not exert the state's full power over obscenity yet would violate the First Amendment. A statute forbidding the sale of obscene books unless the book confined its depictions to procreative sex would be one. *The state is permitted to suppress obscenity but it is not permitted to distort the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message.* It makes no difference whether this conclusion is premised on the equal protection clause as informed by policies drawn from the free-speech and free-press clauses or on the speech and press clauses themselves.[13]

Fundamental First Amendment precepts require that St. Paul's content-based restrictions be subjected to the strictest judicial scrutiny. Basic to the First Amendment is the notion that the state may not remove certain issues from public discourse; permitting this would allow gov-

[13] *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990) (citations omitted) (emphasis added), *cert. denied*, 111 S. Ct. 713 (1991). Plaintiff had contended that a statute prohibiting the sale of obscene materials was unconstitutionally vague. In reversing the district court, the Seventh Circuit rejected that challenge but noted that the statute would have been susceptible to First Amendment challenge had it underinclusively picked out only "disfavored" obscenity.

ernmental bans on discussions of foreign policy questions, labor disputes, art and so forth:

> If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.' To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Consolidated Edison Co., 447 U.S. at 537-38 (citations omitted).

Strict scrutiny is even more appropriate when the State prohibits one viewpoint, while allowing contrary perspectives, because the distortion of the marketplace of ideas is even more pronounced.[14] As the Court has explained, the principle that "governmental bodies may not prescribe the form or content of individual expression" is designed to "put[] the decision as to what views shall be voiced largely into the hands of each of us . . . and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[15]

It is no answer to argue that fighting words are entitled to no First Amendment protection, and therefore that any subcategory of fighting words may be prohibited without distorting the marketplace of ideas.[16]

---

[14] *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (invalidating statute that permitted church services, but not other religious meetings, in public parks because of viewpoint discrimination against Jehovah's Witnesses); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same). As this Court has stated, "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't v. Mosley*, 408 U.S. at 96 (footnote omitted).

[15] *Cohen v. California*, 403 U.S. 15, 24 (1971).

[16] Such an extreme view would, for example, permit a State to forbid only fighting words that offend Republicans or Catholics. It would also imply that a State could forbid only obscenity that

To be sure, the Court remarked in dictum in *Chaplinsky v. New Hampshire*, 315 U.S. at 571-72, that "fighting words" are "no essential part of any exposition of ideas."[17] Importantly, however, the Court has construed the fighting words doctrine extremely narrowly, and has overturned every single fighting words conviction that it has reviewed since *Chaplinsky*.[18] Indeed, Members of this Court[19] and commentators[20] have questioned whether

---

casts disrepute or contempt on governmental policy, or only libel of government officials.

[17] The quoted language from *Chaplinsky* was wholly unnecessary to the Court's result, and "has served to bedevil First Amendment jurisprudence." Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 533 (1980); *see* n.20 *infra*.

[18] *See, e.g., Lucas v. Arkansas*, 416 U.S. 919 (1974); *Kelly v. Ohio*, 416 U.S. 923 (1974); *Rosen v. California*, 416 U.S. 924 (1974); *Karlan v. City of Cincinnati*, 416 U.S. 924 (1974); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972).

[19] *Gooding v. Wilson*, 405 U.S. 518, 537 (1972) (Blackmun., J., dissenting, joined by Burger, C.J.).

[20] *See, e.g.*, Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 536 (1980) (post-*Chaplinsky* Supreme Court decisions have rendered fighting words doctrine "nothing more than a quaint reminder of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"); Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 1-2 (1975) ("majority of the U.S. Supreme Court has gradually concluded that fighting words, no matter how narrowly defined, are a protected form of speech"). *See also Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605 (1979); Letter from Professor Gerald Gunther to Professor George Parker, Chair of the Student Conduct Legislative Council at Stanford University (May 1, 1989), *reprinted*

Chaplinsky's fighting words doctrine remains good law. Simply put, unless construed narrowly, the fighting words doctrine could be used by majorities to suppress unpopular ideas on the grounds that they are likely to provoke violence.

Moreover, the position of the State in this case, and the opinion of the Minnesota Supreme Court, show that petitioner's "fighting symbol" plainly did communicate an idea—albeit a repugnant one. Thus, the State repeatedly and properly concedes that its prohibition is aimed at the expressive content of a certain class of fighting words: "The State agreed that the act of cross-burning was 'expression' in the sense that a message was intended to be conveyed . . . ."; [21] "It is a question for the trier of fact to determine whether the actor intended that message to be conveyed to the victims; in this case, the fact finder certainly could—and necessarily would—so find." [22]

Similarly, the Minnesota Supreme Court's opinion in this case demonstrates that fighting words may have expressive content. As discussed in detail above, Minnesota

---

in STAN. UNIV. CAMPUS REP., May 3, 1989, at 18. In his letter, Professor Gunther reasoned that:

> [T]here has been only *one* case in the history of the Supreme Court in which a majority of the Justices has ever found a statement to be a punishable resort to "fighting words." (That case was *Chaplinsky v. New Hampshire*, a nearly 50-year-old case involving words which would very likely not be found punishable today.) More important, in the nearly half-century since *Chaplinsky*, there have been repeated appeals to the Court to recognize the applicability of the "fighting words" exception. . . . [I]n every one of the subsequent attempted reliances on that exception, the Supreme Court has refused to affirm the challenged convictions. In short, one must wonder about the strength of an exception which, while theoretically recognized, has ever since 1942 not been found apt in practice.

[21] Appellant's Brief at 16.

[22] *Id.* at 19.

seeks to punish petitioner precisely because of the message that his conduct conveyed about a subject of preeminent public concern. It is the crude "notion" of racial superiority communicated by petitioner's acts that Minnesota finds "virulent" and "deplorable"—and hence, unlawful.[23]

At the end of the day, Minnesota may be correct that petitioner's message of racial hatred is too abhorrent for society to tolerate. But, by choosing to punish the communication of *that idea*, Minnesota has conceded that petitioner's conduct does express an idea. Because Minnesota has chosen to criminalize the expression of an idea with a particular content, its regulation is subject to the strictest judicial scrutiny.

III. THE ST. PAUL ANTI-BIAS ORDINANCE DOES NOT SURVIVE STRICT SCRUTINY ANALYSIS.

A governmental restriction on the content of speech will be sustained only if it "is a precisely drawn means of serving a compelling state interest." [24] Minnesota might offer two possible rationales for this ordinance. First, Minnesota might assert a compelling interest in prohibiting the use of bias-motivated symbols in order to maintain public order. *See R.A.V.*, 464 N.W.2d at 511. Second, Minnesota might claim that it has an interest in prohibiting the racially discriminatory and religiously intolerant ideas that accompany certain "fighting words." Under either rationale, the ordinance fails to satisfy the exacting scrutiny required by the First Amendment.

---

[23] This Court has repeatedly recognized the efficacy of symbols in communicating ideas. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, ideas, institution, or personality, is a short cut from mind to mind." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. at 632.

[24] *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 540. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 413 (1989).

A. The State's Interest in Prohibiting the Use of Bias-Motivated Symbols in Order to Maintain Public Order Is Neither Implicated Nor Compelling in This Case.

Minnesota's interest in prohibiting the use of bias-motivated symbols that amount to "fighting words" is not compelling in this case, and even if it were, the anti-bias ordinance is not a narrowly tailored means of achieving that end. To be sure, Minnesota has an interest in maintaining public order, and it arguably may be permitted to achieve this end by prohibiting all "fighting words." [25] Indeed, Minnesota already has a general prohibition against all "fighting words," regardless of their content. *See* Minn. Stat. Ann. § 609.72, Subd. 1(3) (1990) (construed in *In re S.L.J.*, 263 N.W.2d 412, 418-19 (Minn. 1978), as reaching "offensive, obscene, or abusive language or boisterous and noisy conduct" which constitutes "fighting words").

Because the State already has a content-neutral law prohibiting "fighting words," its interest in further prohibiting the subset of "fighting words" at issue in this case is not compelling. In *Texas v. Johnson*, this Court observed that Texas had no significant interest in punishing flag desecration in order to keep the peace because Texas already had a statute specifically prohibiting breaches of the peace. 491 U.S. at 410. The same logic applies in this case as Minnesota already has a statute that, as interpreted by the Minnesota Supreme Court, prohibits "fighting words" and "imminent lawless action."

---

[25] As discussed above, there is good reason to apply *Chaplinsky* with caution, particularly where speech or expressive conduct concerns issues of general public importance. Any fighting words prohibition must be read to embrace only words which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Chaplinsky*, 315 U.S. at 573 (citations omitted). *See Houston v. Hill*, 482 U.S. 451, 462 (1987).

Even if one assumed that Minnesota's interest in preserving public order were implicated, this ordinance is not a "precisely drawn means of serving that interest." [26] In fact, the State's attempt to prohibit only a subcategory of fighting words is "strikingly underinclusive." *Erznoznik v. City of Jacksonville*, 422 U.S. at 214. Although a legislature may often deal with only one part of a problem without addressing the entire problem,[27] content-based restrictions on speech trigger the most exacting judicial scrutiny.

Thus, in *Erznoznik v. City of Jacksonville*, this Court struck down a law prohibiting drive-in theaters from showing nude scenes if these movies could be seen from a public place. Although the State asserted an interest in preventing traffic hazards, the Court emphasized the underinclusiveness of the ordinance and concluded that the regulation impermissibly singled out movies with nudity for special treatment while failing to regulate other movies which created the same alleged risk to traffic. 422 U.S. at 214. Similarly, in *Police Department v. Mosley*, 408 U.S. at 100, the Court acknowledged that cities may have a substantial interest in prohibiting picketing that disrupts a school, but held that the city may not ban non-labor picketing "unless that picketing is clearly more disruptive than the picketing Chicago . . . permits."

---

[26] *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980). This Court can reach the question of whether Minnesota has a compelling interest in prohibiting fighting words "based on race, color, creed, religion, or gender," without deciding the question whether the State has an interest in prohibiting all fighting words. *See Boos v. Barry*, 485 U.S. 312, 324 (1988) ("Even if we assume that [the] law recognizes a dignity interest and that it should be considered sufficiently 'compelling' to support a content-based restriction on speech, we conclude that [this provision] is not narrowly tailored to serve that interest.").

[27] *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 (1955).

This case is no different. If the St. Paul ordinance is intended to prevent violence, then there is no reason for confining the prohibition to a limited category of fighting words. As Justice Black observed in *Cox v. Louisiana*, Minnesota "is attempting to pick and choose among the views it is willing to have discussed on its streets." 379 U.S. at 580-81.

B. The St. Paul Ordinance May Not Constitutionally Prohibit the Ideas That Accompany Certain "Fighting Words."

In its brief in the Supreme Court of Minnesota, the State asserted that the legislature has a "legitimate" and "paramount concern" in limiting racist speech that constitutes fighting words.[28] Likewise, the Minnesota Supreme Court opinion affirmed the responsibility . . . of diverse communities to confront [notions of racial supremacy] in whatever form they appear." *R.A.V.*, 464 N.W.2d at 508. In short, the State is concerned not with prohibiting "fighting words," but only with banning messages of racial and religious bigotry and intolerance.

Petitioner's crude message of racial hatred is plainly inconsistent with the highest aspirations of this Nation. The Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Exercise Clause, along with landmark federal legislation, testify to our commitment to the goals of racial and religious harmony and gender equality. But the First Amendment does not permit the State to prohibit the communication of ideas simply because they are contrary to this commitment. This Court has recently emphasized that "[t]he First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination based on race is odious and

[28] Appellant's Brief at 26.

destructive—will go unquestioned in the marketplace of ideas." *Texas v. Johnson*, 491 U.S. at 418.[29]

There can be no doubt that the notions of racial supremacy expressed by petitioner are offensive. If petitioner's notions of racial supremacy gained wide currency, our nation would suffer. But this Court has repeatedly held that the First Amendment forbids the assumption that ideas are in themselves "offensive" or "harmful."[30] Instead, the First Amendment is based upon the belief that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than to close them." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).[31]

[29] *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Lower federal courts have also refused to exempt antisocial speech from the protection of the First Amendment. For example, when Indiana enacted antipornography legislation, the Seventh Circuit invalidated the statute, explaining:

> Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.

American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (Easterbrook, J.), *aff'd mem.*, 475 U.S. 1001 (1986).

[30] *Texas v. Johnson*, 491 U.S. at 414.

[31] *See also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 (1978) ("[I]f there be any danger that the people cannot evaluate the information and arguments advanced [in public exchanges], it is a danger contemplated by the Framers of the First Amendment."); *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 97 (1977) (rejecting "'highly paternalistic'" argument that ban on "For Sale" signs was necessary to protect citizens' welfare: "'[i]t is precisely this kind

Under the First Amendment, the remedy for repugnant ideas and pernicious philosophies is not governmental suppression. Such an approach would inevitably invite the prohibition of unpopular minority viewpoints—as occurred with the socialist movement during the early decades of this century.[32] And it would preempt the process of open public discussion of competing philosophies and viewpoints—which under the Constitution is our best determinant of truth and falsity.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041

GARY B. BORN
Counsel of Record
STUART P. GREEN
WILMER, CUTLER & PICKERING *
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amicus Curiae
Center for Individual Rights

July 25, 1991

---

of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

[32] *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

* Christopher F. Boyd and Jonathan F. Klein, law student interns at the law firm of Wilmer, Cutler & Pickering, assisted in the preparation of this brief.

(10)

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R.A.V.

v.

ST. PAUL, MINNESOTA

On Appeal from the Supreme Court of Minnesota

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS AND FREEDOM TO READ FOUNDATION

BRUCE RICH
LINDA STEINMAN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8000

BRUCE J. ENNIS
KIT A. PIERSON
THERESA A. CHMARA
JENNER & BLOCK
21 Dupont Circle
Washington, D.C. 20036
(202) 223-4400

Attorneys for Amici Curiae

July 25, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE VITALITY OF THE FIRST AMENDMENT OVERBREADTH DOCTRINE MUST BE PRESERVED	6
A. Criminal Punishment of Petitioner's Conduct Does Not Require Overbroad Legislation or Restriction of the Overbreadth Doctrine	6
B. The Overbreadth Doctrine is an Essential Part of This Court's First Amendment Jurisprudence	8
II. THE ST. PAUL ORDINANCE, BOTH ON ITS FACE AND AS CONSTRUED, IS UNCONSTITUTIONALLY OVERBROAD	10
A. The St. Paul Ordinance, On its Face, Criminalizes a Substantial Amount of Constitutionally Protected Speech	10
B. The Lower Court's Narrowing Construction Did Not Cure the St. Paul Ordinance's Overbreadth	14
1. *The ordinance, as construed, unconstitutionally criminalizes controversial expressive conduct and speech based solely on the audience's reaction*	15
2. *The lower court's attempt to incorporate the Chaplinsky standards into the St. Paul ordinance creates substantial overbreadth problems*	20
CONCLUSION	24

TABLE OF AUTHORITIES

Cases: Page

American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) .. 21
Anti-Defamation League of B'nai B'rith v. Federal Communications Commission, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) 21
Bachellar v. Maryland, 397 U.S. 564 (1970) 13
Bigelow v. Virginia, 421 U.S. 809 (1975) 24
Board of Airport Comm'rs v. Jews For Jesus, Inc., 482 U.S. 569 (1987) 9
Boos v. Barry, 485 U.S. 312 (1988) 13
Brandenburg v. Ohio, 395 U.S. 444 (1969) ..... *passim*
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 9
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8, 9, 11
Brown v. Oklahoma, 408 U.S. 914 (1972) 22
Cantwell v. Connecticut, 310 U.S. 296 (1940) 19, 21
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ..... *passim*
Coates v. Cincinnati, 402 U.S. 611 (1971) 13
Cohen v. California, 403 U.S. 15 (1971) 20, 21, 22
Collin v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972) 16
Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) 19
Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) 17
Community for Creative Non-Violence v. Watt, 703 F.2d 586 (1983), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) 11
Cox v. Louisiana, 379 U.S. 536 (1965) 18
Dennis v. United States, 341 U.S. 494 (1951) 16
Dr. Martin Luther King, Jr. Movement, Inc. v. Chicago, 419 F. Supp. 667 (N.D. Ill. 1976) 16, 19
Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 59 (1989) 21

TABLE OF AUTHORITIES—Continued

Page

Edwards v. South Carolina, 372 U.S. 229 (1963) .. 12, 13, 19
Feiner v. New York, 340 U.S. 315 (1951) 19
Garner v. Louisiana, 368 U.S. 157 (1961) 12, 19
Gooding v. Wilson, 405 U.S. 518 (1972) 20, 22
Gregory v. Chicago, 394 U.S. 111 (1969) 18
Hess v. Indiana, 414 U.S. 105 (1973) 17, 18
Houston v. Hill, 482 U.S. 451 (1987) 13
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 14, 23
In Re Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1987) ..... *passim*
Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990) 19
Lewis v. New Orleans, 408 U.S. 913 (1972) 22
Lewis v. New Orleans, 415 U.S. 130 (1974) 22
Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977) 11
Members of City Council v. Taxpayers For Vincent, 104 S.Ct. 2118 (1984) 9
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 17
Secretary of State of Maryland v. Joseph H. Munson, Co., 467 U.S. 947 (1984) 9
Skokie v. National Socialist Party of America, 69 Ill.2d 605, 373 N.E.2d 21 (1978) 11, 19
Speiser v. Randall, 357 U.S. 513 (1958) 8
State v. Brown, 68 N.H. 200, 38 A. 731 (1895) 23
Street v. New York, 394 U.S. 576 (1969) 13, 17, 18
Taylor v. Louisiana, 370 U.S. 154 (1962) 19
Terminiello v. Chicago, 337 U.S. 1 (1949) 13, 19
Texas v. Johnson, 109 S.Ct. 2533 (1989) ..... *passim*
Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973) 21

Statutes:

U.S. Const. amend. I ..... *passim*
Fla. Stat. § 876.18 6
Idaho Code § 17-7902(b) 6

TABLE OF AUTHORITIES—Continued

	Page
Minn. Stat. § 609.17	4, 7
Minn. Stat. § 609.595, Subd. 2	7
Minn. Stat. § 609.563, Subd. 2	7
Minn. Stat. § 609.713, Subd. 1	7
Minn. Stat. § 609.746, Subd. 3	7
Minn. Stat. § 609.2231	4
Minn. Stat. § 609.2231, Subd. 4	7
N.J. Stat. §§ 2C:33-10 (1987)	6
O. C. Ga. § 16-11-37(b) (1989)	6
St. Paul, Minn. Ordinance § 292.01	7
St. Paul, Minn. Ordinance § 292.02	*passim*
Miscellaneous:	
Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989)	12
Benno C. Schmidt, Jr., *Universities must defend free speech*, The Wall Street Journal, May 6, 1991	12
Gard, *Fighting Words as Free Speech*, 58 WASH. U. LAW Q. 531 (1980)	23
Tribe, AMERICAN CONSTITUTIONAL LAW 929 (2d Ed. 1988)	23
Wash. Post, Section D3 (Nov. 4, 1977)	18
Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37 (1976)	23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-7675

R.A.V.

v.

ST. PAUL, MINNESOTA

On Appeal from the Supreme Court of Minnesota

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS AND FREEDOM TO READ FOUNDATION

INTEREST OF AMICI CURIAE *

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its over two hundred members include most of the major commercial book publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by the American Library Association ("ALA"). The ALA is the oldest and largest library association in the world and the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 libraries and more than 47,000 individuals, primarily li-

* Both parties have consented to the filing of this *amici* brief.

brarians. The ALA established the Foundation in order to promote and defend First Amendment rights; foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and set legal precedent for the freedom to read of all citizens.

AAP and the Foundation are participating as *Amici* in this case because the lower court's misapplication of the overbreadth doctrine threatens to erode this vital principle of First Amendment jurisprudence. The overbreadth doctrine is critically important to publishers and libraries, whose very reason for existence is to engage in activities protected by the First Amendment.

Given the scope of the First Amendment activities engaged in by publishers and libraries, their interests are often implicated by statutes enacted to regulate or prohibit speech activities. In many instances, these statutes, even if well intentioned, are not narrowly drawn and as a result impermissibly restrict a substantial amount of constitutionally protected speech.

The First Amendment overbreadth doctrine is essential to protect publishers and libraries from the chilling effect of overbroad statutes. In most instances, these statutes do not result in actual prosecutions of publishers or librarians, who therefore cannot directly challenge the overbreadth of the statutes' express terms. And in all but the most extreme cases, a declaratory judgment action, which may involve years of litigation, is simply not a practical option. This is especially true for libraries, most of which are publicly funded and operated. Public libraries are naturally reluctant to use scarce tax dollars to finance litigation challenging state statutes, and because they are dependent on government support, they understandably fear the political fallout that would result if they challenge actions of the legislature.

For the vast majority of publishers and librarians, the only practical response to an overbroad criminal statute is compliance with the literal terms of the statute. Most publishers and librarians will not risk violation of a criminal statute and should not be expected to take that risk. Instead, they are compelled by overbroad statutes to forego First Amendment rights.

The overbreadth doctrine protects publishers and librarians from this chilling effect by permitting a defendant prosecuted under an overbroad statute to challenge its overbreadth even if the statute would be constitutional as applied to that defendant. Thus, if a statute unconstitutionally proscribes protected activities of publishers and librarians, the overbreadth doctrine assures that at an early opportunity, the statute will either be narrowly construed to cure the overbreadth or will be found unconstitutional.

The problem in this case is that the lower court has misapplied the overbreadth doctrine in a manner that does not cure the overbreadth of the St. Paul ordinance, but instead perpetuates its infirmities. In its haste to sanction Petitioner's reprehensible conduct, the lower court has shown that hard cases can indeed make bad law. Because this misapplication of the overbreadth doctrine threatens the First Amendment interests of the Association of American Publishers and the Freedom to Read Foundation, they are participating as *Amici* to urge reversal of the lower court's decision.

SUMMARY OF ARGUMENT

The reprehensible conduct that resulted in this prosecution is clearly within the power of the State to punish. This conduct can be constitutionally punished under state statutes that have been adopted throughout the country to criminalize precisely this type of conduct, or under more general criminal statutes, such as trespass or assault laws. Indeed, regardless of the disposition of this

petition, Petitioner will be prosecuted in Minnesota for violation of the State's assault statute, Minn. Stat. § 609.2231, and criminal attempt statute, Minn. Stat. § 609.17, neither of which is at issue here.

If the State of Minnesota had followed the approach of many states and enacted carefully tailored legislation criminalizing cross burning or similar conduct on the property of an unconsenting third party, or had prosecuted under a statute that does not target expressive activity, this case would not be here. Instead, the prosecution amended its juvenile petition to add a count based on a local ordinance that broadly prohibits speech and expressive conduct that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." St. Paul Ord. 292.02.

In doing so, Minnesota effectively invited the courts to address the overbreadth of this criminal ordinance. Thus, the fact that this Court is now confronted with substantial constitutional questions that could easily have been avoided, reflects no infirmity in the First Amendment's overbreadth doctrine; it results from the State's decision to prosecute under an overbroad ordinance. *Point I.A.*

The overbreadth doctrine is a crucial element of First Amendment jurisprudence, fundamental to the preservation of First Amendment rights. The particular facts of this case must not be used to erode the protection of First Amendment rights afforded by this doctrine. *Amici* therefore urge the Court to resolve this case in a manner that preserves the vitality of the First Amendment overbreadth doctrine. This doctrine encourages legislatures to act with restraint in criminalizing speech and expressive conduct and protects the First Amendment rights of *Amici's* membership—publishers and librarians whose First Amendment rights are often subject to overbroad regulation, and who may be forced to compromise those rights rather than risk noncompliance with criminal

statutes. Regardless of the outcome of this case, it is critical that the protection afforded by the overbreadth doctrine be retained. *Point I.B.*

The lower court did not dispute Petitioner's claim that the ordinance, as written, is substantially overbroad. Indeed, on its face the ordinance encompasses not only expressive conduct, but also pure speech on public or private property (including the speaker's property). Although the lower court appropriately criticized Petitioner's conduct, it lost sight of the fact that the ordinance criminalizes a substantial amount of political speech and expressive conduct that requires First Amendment protection precisely because it *is* controversial and arouses "anger, alarm or resentment." For example, much of the expressive and peaceful conduct by blacks seeking equal rights in the South during the 1950's and 1960's aroused anger, alarm, resentment, and often violent reactions, on the basis of race—yet this Court consistently and emphatically recognized that the expressive conduct by these black citizens was at the very heart of the First Amendment. *Point II.A.*

In its zeal to cure the ordinance's overbreadth so that Petitioner could constitutionally be prosecuted under it, the lower court essentially rewrote the statute by incorporating, though inaccurately, this Court's decisions in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). This almost tautological approach to curing statutory overbreadth is particularly troublesome in this case, because the lower court incorporated *selected language* from the *Chaplinsky* and *Brandenburg* cases, without regard to the context in which that language was used at the time, and without regard to doctrinal developments in the half-century that has followed *Chaplinsky*, and the two decades that have followed *Brandenburg*. Far from curing the overbreadth of St. Paul's "hate-speech" statute, the lower court's incorporation of selected language from *Chaplinsky* and

Brandenburg has produced an ordinance that, even as construed, is overbroad and cannot survive First Amendment scrutiny. *Point II.B.*

ARGUMENT

I. THE VITALITY OF THE FIRST AMENDMENT OVERBREADTH DOCTRINE MUST BE PRESERVED.

A. Criminal Punishment of Petitioner's Conduct Does Not Require Overbroad Legislation or Restriction of the Overbreadth Doctrine.

Petitioner's conduct was repugnant and deserves punishment. The lower court recognized this in observing that Petitioner's cross burning was "deplorable conduct that the City of St. Paul may without question prohibit." *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1987). *Amici* wholeheartedly agree with that conclusion. The lower court erred, however, in concluding that St. Paul Ordinance § 292.02 is a constitutionally permissible means to exercise this state power. That conclusion is not required to protect the State's interest, and is not permitted by the First Amendment.

There are ample means available to states that wish to criminalize conduct of this type. Indeed, states across the country have passed statutes that specifically criminalize cross burning and similar conduct. For example, states have passed criminal statutes that prohibit: (a) burning a flaming cross with intent to terrorize another or another's household, O.C. Ga. § 16-11-37(b) (1989); (b) burning a flaming cross on property of another without consent, Fla. Stat. § 876.18; (c) damaging, destroying or defacing any real or personal property of another, Idaho Code § 17-7902(b); and (d) knowingly or recklessly attempting to put another in fear of bodily violence by placing a burning cross or swastika on their property, N.J. Stat. §§ 2C:33-10 (1987). Such misconduct can also

be regulated by more general criminal statutes, such as statutes prohibiting trespass on the property of another, statutes punishing assault, or statutes making it unlawful to set fires on the property of another.

Thus, it is clearly within a state's authority to criminalize Petitioner's conduct in this manner. It is equally clear that the Minnesota criminal code already provides ample means to punish this conduct without relying on St. Paul Ordinance § 292.02. Indeed, in this prosecution, Petitioner has also been charged with violation of the state's criminal assault statute, Minn. Stat. § 609.2231 Subd. 4, and the state's criminal attempt statute. Minn. Stat. § 609.17. Petitioner has not questioned the constitutionality of these assault and attempt statutes. Thus, regardless of the outcome of this petition, Petitioner will be prosecuted.[1]

In fact, Petitioner was not initially charged with a violation of the ordinance at issue here. Petitioner was originally charged with violation of the State assault and attempt statutes, and a different local ordinance. The State then amended its petition to include prosecution under the ordinance at issue here, which criminalizes expressive conduct that arouses "anger, alarm or resentment in others" based on race, religion or gender.[2]

By relying on an ordinance that broadly targets both expressive conduct and pure speech, *see Point II.A infra*,

---

[1] There are other Minnesota criminal statutes that Petitioner might have been charged with violating. *See* Minn. Stat. § 609.595, Subd. 2 (criminal damage to property); Minn. Stat. § 609.563, Subd. 2 (arson in the third degree); Minn. Stat. § 609.746, Subd. 3 (intrusion on privacy); Minn. Stat. § 609.713, Subd. 1 (terroristic threats); St. Paul Ord. § 292.01 (similar to St. Paul Ord. § 292.02, but limited to intentional or reckless conduct putting another in fear of immediate bodily harm or death). *Amici* express no view as to the constitutionality of these statutes.

[2] The charged violation of St. Paul Ordinance § 292.02 replaced the charged violation of St. Paul Ordinance § 292.01.

the State injected overbreadth issues into this case. If the government had enacted a narrow statute or ordinance similar to those enacted in many other states, or if the prosecution had relied only on general criminal statutes that did not target speech or expressive conduct (such as the Minnesota assault statute), this case would not raise substantial constitutional questions. By virtue of the government's decision to include a count based on an ordinance that criminalizes a broad range of expression, the courts are necessarily, and quite appropriately, required to determine whether that ordinance is unconstitutionally overbroad.

B. The Overbreadth Doctrine is an Essential Part of This Court's First Amendment Jurisprudence.

The First Amendment overbreadth doctrine stems from this Court's longstanding recognition "that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). As the Court explained in *Speiser v. Randall*, 357 U.S. 513, 525 (1958), "[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." Accordingly, "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Id.*

As a corollary to the requirement that laws regulating First Amendment activity be narrowly drawn, this Court "has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick*, 413 U.S. 601, 612. The defendant is permitted to attack the validity of the statute on its face, not simply as applied to the defendant, because an overbroad statute "also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). *See also Board of Airport Comm'rs v. Jews For Jesus, Inc.*, 482 U.S. 569, 574 (1987). In short, overbroad statutes pose "a danger of chilling free speech," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984); "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[3] Accordingly, it is now well established that if a statute's overbreadth is substantial, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Brockett*, 472 U.S. at 503-04. *See also Members of City Council v. Taxpayers For Vincent*, 104 S.Ct. 2118, 2125 (1984) ("The Court has repeatedly held that . . . a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it.").

The overbreadth doctrine, like many principles of constitutional adjudication, is not without some cost. In some cases, it may permit a party whose conduct could constitutionally be proscribed to avoid any sanction. In other cases, such as this, it merely prevents a particular law from being applied to that party, while leaving the State free to proceed with prosecution under other criminal laws. In either situation, however, this Court has consistently recognized that if the statute is substantially

---

[3] *Broadrick*, 413 U.S. at 612.

overbroad and the overbreadth cannot be cured by a narrowing construction, invalidation is required because of the transcendent value of the First Amendment's protections. *Amici* urge the Court to reaffirm this important First Amendment doctrine in this case.

II. THE ST. PAUL ORDINANCE, BOTH ON ITS FACE AND AS CONSTRUED, IS UNCONSTITUTIONALLY OVERBROAD.

In upholding St. Paul Ordinance § 292.02, the lower court did not dispute Petitioner's contention that the plain language of the ordinance criminalizes a substantial amount of constitutionally protected speech and expressive conduct. Indeed, the lower court acknowledged that "the St. Paul ordinance should have been more carefully drafted." *In re Welfare of R.A.V.*, 464 N.W.2d at 511. The court then disregarded the express terms of the ordinance and wrote limitations into the ordinance in an effort to cure its unconstitutional overbreadth. In the discussion that follows, *Amici* will first address the substantial overbreadth of the ordinance as written, and will then demonstrate that the lower court's effort to cure this overbreadth was unsuccessful.

A. The St. Paul Ordinance, On its Face, Criminalizes a Substantial Amount of Constitutionally Protected Speech.

Section 292.02 provides that it is a criminal act to

> place on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender . . .

Several aspects of this statutory language require emphasis.

First, the statutory prohibition includes pure speech as well as expressive conduct.[4] Its prohibition includes signs, placards, and other objects that explicitly communicate ideas.[5] Furthermore, in regulating conduct because of the message it communicates the ordinance implicates First Amendment concerns. "A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." [6]

Second, the prohibition is not limited to speech activities on public property, or on private property owned by unconsenting third persons. It encompasses all public and private property without limitation. Placing a sign on one's own property is encompassed by the plain language of the ordinance.[7]

---

[4] The lower court appears to have assumed the ordinance only criminalizes conduct, and ignores the fact that the ordinance plainly applies to objects such as signs that include written communication. Because the court did not focus on this distinction, its opinion loosely describes the ordinance as regulating both conduct and "expressions of hatred." *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

[5] *Cf., Skokie v. National Socialist Party of America*, 69 Ill.2d 605, 373 N.E.2d 21 (1978) (reversing injunction against demonstrators who wanted to stand on public property in uniforms with swastikas, holding placards saying "Free Speech for the White Man", "Free Speech for White America", and "White Free Speech"). The expressive conduct which the Illinois Supreme Court found protected by the First Amendment—including placards and symbols that could have provoked violent reactions—would be subject to the St. Paul ordinance as construed by the lower court.

[6] *Texas v. Johnson*, 109 S.Ct. 2533, 2540 (1989) (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (1983) (Scalia, J., dissenting), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)) (emphasis in original). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973) (where statute regulates expressive conduct, test is whether statute is substantially overbroad).

[7] *Cf., Linmark Assocs. v. Willingboro*, 431 U.S. 85 (1977) (holding that ordinance prohibiting some owners from posting "For Sale"

Third, although in this case the ordinance is being applied to a "message of racial supremacy" and was apparently directed at members of a minority group,[8] the ordinance covers far more than hate speech directed at minority groups. There is no limitation on the subject matter of the speech, so long as it "arouses anger, alarm, or resentment in others" based on race, color, creed, religion or gender.

Although there have recently been increasing attempts to restrict speech and expressive conduct that causes resentment based on race and gender, the dangers of government regulation of this expression must be evaluated in a larger historical context.[9] During the 1960's these issues were played out in the context of efforts by white majorities, primarily in the South, to regulate speech and speech activities by blacks that offended the majority's "racial sensibilities." In *Garner v. Louisiana*, 368 U.S. 157 (1961), for example, Justice Douglas observed that "[i]n the environment of a segregated community I can understand how the mere presence of a Negro at a white lunch counter might inflame some people as much as fisticuffs would in other places." 368 U.S. at 177 (Douglas, J., concurring). *See also Edwards v. South Carolina*, 372 U.S. 229, 244 (1963) (Clark, J., dissenting) (referring to the danger of "spontaneous combustion in some Southern communities" when black citizens tried to engage in peaceful demonstrations). Thus, if the St. Paul ordinance had been in effect in the South

---

and "Sold" signs on their own private property violated First Amendment).

[8] *See* 464 N.W.2d at 508 n.1 (quoting Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365-2366 (1989)).

[9] Distinguished constitutional scholars have decried these attempts, and have noted the lessons of history. *See, e.g.*, Benno C. Schmidt, Jr., *Universities must defend free speech*, The Wall Street Journal, May 6, 1991.

during the 1950's, it could have been used to prosecute a black family for putting a sign on their front lawn demanding "Integrate all-white schools now!" That speech would certainly have "arouse[d] anger, alarm, or resentment in others on the basis of race" (and might well have provoked an unlawful reaction).

Although the emotions of the 1950's and 1960's have cooled, it remains true that debate about racial quotas, apartheid in South Africa, abortion, homosexuality, and a broad range of other issues continues to "arouse anger, alarm and resentment" based on race, religion, gender and creed. And, as this Court has repeatedly recognized, a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, *or even stirs people to anger.*" *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (emphasis added).

It is quite clear from this Court's First Amendment jurisprudence that government cannot criminalize such speech simply because it arouses anger, alarm and resentment.[10] As this Court observed in *Boos v. Barry*, 485 U.S. 312 (1988), "in public debate our citizens must

---

[10] *See, e.g., Texas v. Johnson*, 109 S.Ct. 2533, 2541 (1989) (same); *Houston v. Hill*, 482 U.S. 451, 461 (1987) (same); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment" of First Amendment freedoms); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) ("Any shock effect caused by the placards, remarks and peaceful marching must be attributed to the content of the ideas being expressed, or to the onlookers' dislike of demonstrations as a means of expressing dissent. But '[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting *Street v. New York*, 394 U.S. 576, 592 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (Constitution "does not permit a State to make criminal the peaceful expression of unpopular views").

tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space to the freedoms protected by the First Amendment.'" 485 U.S. at 322 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)). As *Amici* will now show, the Minnesota court's construction of the ordinance is completely antithetical to this fundamental First Amendment principle and fails to cure the ordinance's unconstitutional overbreadth.

B. The Lower Court's Narrowing Construction Did Not Cure the St. Paul Ordinance's Overbreadth.

Perhaps based on its belief that Petitioner's conduct was "deplorable" and that St. Paul had "the responsibility, even the obligation" to punish this conduct, *In re Welfare of R.A.V.*, 464 N.W.2d at 508, the Minnesota court went to great lengths to overcome the ordinance's constitutional infirmity. With only passing mention of the ordinance's express language (and no discussion of its legislative history or intent), the court tried to save the ordinance by rewriting it to prohibit only speech the court believed the state could constitutionally prohibit under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *In re Welfare of R.A.V.*, 464 N.W.2d at 510. The court then imposed general limitations on the ordinance, based on its reading of *Chaplinsky* and *Brandenburg*. 464 N.W.2d at 510-11.

The prospect of avoiding difficult constitutional questions simply by incorporating Supreme Court cases by reference into criminal laws (regardless of the law's language, history or intent) may be appealing to lower courts. Indeed, in the extreme, a lower court could simply "construe" a speech-regulating statute to prohibit only speech not protected by the First Amendment.

Although this Court will defer to a state court's construction of a state law, it must nevertheless determine

whether the construction cured whatever overbreadth problems the law otherwise had. For example, a "narrowing construction" holding that a criminal prohibition excludes "speech or expressive conduct that cannot be regulated under the First Amendment" is simply a tautology that does nothing to address the concerns underlying the overbreadth doctrine. Speakers already know that statutes and ordinances are subject to limitations imposed by the Constitution. But when a law's express terms criminalize a substantial amount of protected activity and the limitations imposed by the Constitution are not clearly spelled out, there is a substantial danger that speakers will refrain from constitutionally protected activity instead of risking criminal punishment. Although the lower court's narrowing construction does not reach this extreme, it has come impermissibly close.

Furthermore, in choosing selective language from *Brandenburg* and *Chaplinsky*, and essentially writing that language into the ordinance, the lower court ignored the contexts in which those cases were decided as well as this Court's subsequent jurisprudence. In doing so, the lower court perpetuated, rather than cured, the ordinance's constitutional infirmities.

1. *The ordinance, as construed, unconstitutionally criminalizes controversial expressive conduct and speech based solely on the audience's reaction.*

Relying on *Brandenburg*, the lower court held that the State may constitutionally "censor" a speaker any time speech covered by the ordinance *causes* "anger, alarm or resentment" that "rises to the level of 'imminent lawless action.'" *In re Welfare of R.A.V.*, 464 N.W.2d at 510. This selective incorporation of language from *Brandenburg* overlooks the important fact that *Brandenburg* was discussing speech *advocating* imminent unlawful action. Although it is well established that in certain circumstances the government may constitutionally regulate a speaker who urges imminent unlawful conduct, the

lower court's construction of the ordinance goes much further and gives the government unrestricted power to punish a controversial speaker simply because the speaker's viewpoint or ideas *cause* an unlawful reaction *even when the speaker has not urged that reaction and even when that reaction is directed at the speaker.* This construction of the statute is wholly at odds with the First Amendment.[11]

Brandenburg is part of a long line of cases addressing the government's power to regulate *advocacy* of *unlawful* acts. For example, in upholding the Smith Act in *Dennis v. United States*, 341 U.S. 494 (1951), this Court emphasized that the statute "is directed at advocacy. . . . Congress was concerned with those who advocate and organize for the overthrow of the Government." 341 U.S. at 499, 502. In the *Brandenburg* case, this Court did *not* rule—as the lower court incorrectly assumed—that a speaker can constitutionally be punished because the audience violently *disagrees* with the speaker's views and responds violently in order to *suppress* those views. To the contrary, *Brandenburg* held only that a speaker can constitutionally be punished if the speaker *advocates* unlawful action in circumstances where such unlawful action is imminent and likely because the audience *agrees* with the speaker's views.[12]

---

[11] *See, e.g., Skokie*, 373 N.E.2d at 25 ("courts have consistently refused to ban speech because of the possibility of unlawful conduct by those opposed to the speaker's philosophy") (citing *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972)); *Dr. Martin Luther King, Jr. Movement, Inc. v. Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976) ("it is settled law that hostile spectators or bystanders do not justify the restraint of otherwise legal First Amendment activities").

[12] Subsequent cases have consistently recognized that *Brandenburg* was aimed at speakers who advocate, urge or otherwise direct listeners to engage in imminent, unlawful action. *See Texas v. Johnson*, 109 S.Ct. 2533 (1989) (citing *Brandenburg* to support the proposition that this Court has required "careful consideration of the actual circumstances surrounding" provocative speech, and the Court has asked "whether the expression '*is directed* to inciting or producing imminent lawless action and is likely to incite or produce such action'") (emphasis added); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 447-48 (1974); *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

Neither the specific facts of this case, nor the terms of the St. Paul ordinance, even as construed, have anything to do with advocacy of unlawful action. Petitioner is *not* being prosecuted for urging imminent unlawful actions by anyone else. Instead, the ordinance broadly condemns speech and expressive conduct which "*arouses* anger, alarm, or resentment." St. Paul Ord. § 292.02 (emphasis added). As construed by the lower court, "[w]here the 'anger, alarm or resentment' the ordinance speaks of rises to the level of 'imminent lawless action,' the City is permitted to intervene and censor the provocative conduct." *In re Welfare of R.A.V.*, 464 N.W.2d at 510. Thus, as construed, the ordinance criminalizes speech which may provoke imminent lawless action even if the speaker did *not* advocate unlawful action, and even if the unlawful action would be directed *against* the speaker in order to *suppress* the speaker's views.

This criminal sanction is squarely at odds with this Court's longstanding recognition that "under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). *See* n.10 *supra.* Indeed, the construction adopted by the Minnesota court necessarily means that although a speaker cannot be punished if an offended listener responds non-violently, if the listener instead reacts violently *the speaker* can then be criminally punished! Such a rule of law would be contrary to public policy because it would encourage hostile audiences to react violently to messages they find offensive.

In a free society, controversial speech and expressive activity will necessarily prompt angry and sometimes unlawful responses. The Selma march and other freedom marches in the South during the 1960's provoked such responses. Anita Bryant's expression of views against homosexuality prompted threats of violent and unlawful responses. *See, e.g.*, Wash. Post, Section D3 (Nov. 4, 1977). And the annual Ku Klux Klan marches in Washington, D.C., have provoked violent and unlawful responses. But this Court has never held that government may punish controversial speakers as a consequence of such reactions.[13] The Minnesota court's construction of

[13] For example, in *Street v. New York*, 394 U.S. 576 (1969), this Court rejected the proposition that defendant's speech could be criminally punished because his words were so "inflammatory that they would provoke others to retaliate physically against him." 394 U.S. at 591, 592. The Court held that because the statute at issue was not narrowly drawn to punish only the "small class" of "fighting words" recognized by the Court, it violated the First Amendment. 394 U.S. at 592. Here, the lower court did *not* construe the St. Paul ordinance to be limited to "fighting words"; to the contrary, it upheld the imposition of criminal penalties under the ordinance on speech or expressive conduct that *either* was "likely to provoke imminent lawless action *or* constitute[d] 'fighting words.'" *In re Welfare of R.A.V.*, 464 N.W.2d at 510. *See also Hess v. Indiana*, 414 U.S. 105, 109 (1973) (where there was no evidence that defendant's "words were *intended* to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had 'a tendency to lead to violence'") (first emphasis added) (citation omitted).

In many contexts, this Court has struck down convictions where a defendant's exercise of First Amendment rights aroused "anger, alarm or resentment," which either resulted in (or created a substantial threat of) an unlawful response. *See Gregory v. Chicago*, 394 U.S. 111, 120 (1969) (overturning disorderly conduct conviction of leaders of peace march protesting segregation, where hostile hecklers had become noisy and had thrown eggs at marchers, and where policeman in charge at scene believed that onlookers were "dangerously close to rioting"); *Cox v. Louisiana*, 379 U.S. 536, 549 n.12 (1965) (reversing disorderly conduct conviction of student who led march in Louisiana protesting segregation notwithstanding testimony that "violence was about to erupt" from group of 250 predominantly white onlookers); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing conviction of black protesters for "breach of peace"); *Taylor v. Louisiana*, 270 U.S. 154 (1962) (reversing conviction for disturbing the peace where black protesters violated custom segregating people in bus waiting rooms according to their race); *Garner v. Louisiana*, 368 U.S. 157 (1961) (reversing conviction for disturbing the peace where black protesters sat at white lunch counters in business establishments); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (reversing conviction for breach of the peace where controversial speaker in auditorium had attracted angry crowd of one thousand people to protest this meeting, crowd had become angry and turbulent, and there had been several disturbances); *cf. Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (Nazi demonstration in Skokie, Illinois), *cert. denied*, 439 U.S. 916 (1978); *Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978) (same); *Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990); *Dr. Martin Luther King, Jr. Movement, Inc. v. Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976).

the St. Paul ordinance permits such constitutionally protected speech to be suppressed, and the ordinance, as so construed, continues to be overbroad.

This Court's older decisions, in *Feiner v. New York*, 340 U.S. 315 (1951) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), do not dictate a different conclusion. In *Feiner*, the Court accepted the lower court's determination that the speaker was trying to divide a racially mixed and restless crowd into hostile camps, and the Court concluded that the speaker had undertaken "incitement to riot." *Feiner*, 340 U.S. at 321. *See Edwards*, 372 U.S. at 236 (explaining limited holding in *Feiner*). The Court's decision in *Cantwell* reversed convictions for breach of the peace, but included some broad dicta concerning the scope of government authority. The Court's closing analysis, 310 U.S. at 309-10, explains, however, that in "practically all" of the earlier cases in which a breach of the peace conviction was based on provocative speech, the "language . . . consisted of profane, indecent, or abusive remarks directed to the person of the hearer." 310 U.S. at 309. As explained above, the lower court's analysis of the St. Paul ordinance goes substantially beyond speech of this sort.

2. *The lower court's attempt to incorporate the Chaplinsky standards into the St. Paul ordinance creates substantial overbreadth problems.*

Although the lower court's misapplication and expansion of *Brandenburg*, standing alone, renders the ordinance unconstitutionally overbroad,[14] the lower court's construction is constitutionally defective for a second reason. The court construed the ordinance *also* to encompass "expressive conduct that amounts to 'fighting words'—conduct that itself inflicts injury or tends to incite immediate violence." *In re Welfare of R.A.V.*, 464 N.W.2d at 510 (purporting to rely on *Chaplinsky*, 315 U.S. 568). Instead of limiting the ordinance to the small class of words that are so personally insulting as to provoke immediate fisticuffs, the lower court construed the ordinance to encompass far more speech than can constitutionally be criminalized under the "fighting words" doctrine.

This Court's prior decisions indicate that states can constitutionally criminalize "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971).[15] The Court has repeatedly made clear, however, that this authority is "limited in application, as in *Chaplinsky*, to words that have a direct tendency to cause acts of violence by the person to whom, *individually*, the remark is addressed." *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (emphasis added). In this case, however, the ordinance, *even as construed*, is *not* restricted to speech

---

[14] The lower court construed the ordinance to permit suppression of all speech that could be prohibited under the lower court's mistaken interpretation of *Brandenburg or* under the lower court's understanding of *Chaplinsky*. As explained in *Point II.B.1*, the statute is substantially overbroad by virtue of the lower court's overbroad interpretation of *Brandenburg* regardless of whether the lower court correctly interpreted and incorporated the "fighting words" doctrine of *Chaplinsky*.

[15] *See, e.g., Texas v. Johnson*, 109 S.Ct. 2533, 2542 (1989).

that is "directed to the person of the hearer" (*Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)), and would be understood by the listener "as a direct personal insult." *Cohen*, 403 U.S. at 20. The lower court's construction of the "fighting words" doctrine does not even mention, much less stress, that important limiting factor. To the contrary, the lower court describes the "fighting words" doctrine as permitting suppression of speech "that itself inflicts injury or tends to incite immediate violence," *In re Welfare of R.A.V.*, 464 N.W.2d at 510, with no requirement that the speech be directed, personally, to the recipient.[16] Ordinary citizens reading the opinion of the court below would therefore be led to believe, incorrectly, that their speech could constitutionally be punished if it inflicted injury or tended to incite immediate violence against the speaker, even if their speech was *not* directed personally to the listener. Thus, because of the lower court's partial and misleading incorporation of a *portion* of the "fighting words" doctrine, citizens will self-censor speech that could not constitutionally be suppressed, and the ordinance, even as construed, continues to be unconstitutionally overbroad.[17]

---

[16] This omission does not appear to be inadvertent. For example, at another point in its discussion, the lower court noted that the ordinance was being interpreted to reach *both* "expressions of hatred *and* resorts to bias-motivated *personal* abuse." 464 N.W.2d at 511 (emphasis added).

[17] The St. Paul ordinance does *not* regulate "group libel"—it punishes speech that arouses anger regardless of whether the speech is libelous. The ordinance also does not provide any of the limitations required by this Court's First Amendment decisions relating to libel laws. *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989) (expressing doubt about continuing vitality of group libel concept), *cert. denied*, 110 S.Ct. 59 (1989); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (same), *aff'd*, 475 U.S. 1001 (1986); *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) (same); *Anti-Defamation League of B'nai B'rith v. Federal Communications Commission*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

The lower court's broad interpretation of *Chaplinsky* is suspect on an additional ground, as well. The lower court interpreted *Chaplinsky* as permitting suppression of "fighting words," which it described as "conduct that itself inflicts injury *or* tends to incite immediate violence." 464 N.W.2d at 510 (emphasis added). The notion that a criminal statute can be made constitutional by "limiting" its reach to words "which by their very utterance inflict injury," *id.* (quoting from *Chaplinsky*), even if those words do *not* have a tendency to incite immediate violence, should be squarely rejected by this Court. Although disjunctive language (inflict injury or incite violence) was used by the Court in *Chaplinsky*, and has been quoted in some—but not all—of the Court's subsequent cases discussing the fighting words doctrine, that broad reading of *Chaplinsky* has not, in practice, been applied by this Court.[18] In the *Chaplinsky* type cases, the Court has invoked the overbreadth doctrine, as it should do here, and has therefore found it unnecessary to consider application of the "fighting words" doctrine to the facts of the particular case. Nevertheless, although dictum, the clear trend in the language of post-*Chaplinsky* decisions is to restrict the doctrine to fighting words that do have a tendency to incite immediate violence.[19] Legal

[18] *See, e.g., Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Cohen v. California*, 403 U.S. 15 (1971).

[19] For example, in *Texas v. Johnson*, 109 S.Ct. 2533 (1989), the Court explained:

> Nor does Johnson's expressive conduct fall within the small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

109 S.Ct. at 2542. *See also Cohen v. California*, 403 U.S. 15, 20 (1971); *Gooding v. Wilson*, 405 U.S. 521, 524 (1972). Indeed, even

commentators agree that this Court has limited the fighting words doctrine to words having a tendency to incite immediate violence and breach of the peace.[20]

There is good reason to limit the "fighting words" doctrine to personal insults likely to produce imminent violence. Indeed, criminalizing speech simply because it "inflicts injury" would be inconsistent with this Court's repeated holdings that speech cannot be proscribed merely because it offends or angers the listener. *See* n.10 *supra*. In *Hustler Magazine v. Falwell*, this Court squarely rejected the proposition that offensive speech could be proscribed simply because it was labeled "outrageous":

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

485 U.S. at 55. Although this and other decisions suggest that words which "inflict injury" are not in all respects identical to "outrageous" or "offensive" words, their impact is certainly substantially similar. Given the inherent ambiguity in the phrase "words which by their very utterance inflict injury," and the absence of any defining cases in this Court in the half century since *Chaplinsky*, the lower court erred when it held that

in *Chaplinsky*, the state courts had authoritatively construed the statute at issue to regulate only words having "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Chaplinsky*, 315 U.S. at 573 (quoting *State v. Brown*, 68 N.H. 200, 38 A. 731) (1895)).

[20] *See* Tribe, AMERICAN CONSTITUTIONAL LAW 929 (2d Ed. 1988); Gard, *Fighting Words As Free Speech*, 58 WASH. U. LAW Q. 531, 534 (1980). *See also* Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37, 53-54 (1976).

speech can constitutionally be suppressed whenever it "inflicts injury," *regardless* of whether it is likely to provoke an imminent lawless response. That overbroad construction of *Chaplinsky* does not sufficiently reduce the risk that constitutionally protected speech and expressive conduct will be unduly chilled by this ordinance, as construed.

CONCLUSION

The government has at its disposal a substantial arsenal of criminal statutes to punish individuals who engage in the type of conduct involved here. In deciding to prosecute Petitioner under St. Paul Ordinance § 292.02, however, the government has invoked an ordinance that impermissibly criminalizes constitutionally protected speech and expressive conduct. Prosecution under this vague and overbroad ordinance is neither required to achieve the government's interest nor permitted by the First Amendment.

In trying to save the statute by incorporation of selected portions of the language from *Brandenburg* and *Chaplinsky*, the lower court has not cured the statute's overbreadth. To the contrary, protected First Amendment speech and expressive conduct will continue to be chilled not only by the broad reach of the statute's express terms, but also by the overbroad constructions of *Brandenburg* and *Chaplinsky* adopted by the lower court. Because of the "transcendent value to all society of constitutionally protected expression," *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975), this result cannot be reconciled with the First Amendment. *Amici* therefore urge the court to reaffirm the importance of the First Amend-

ment overbreadth doctrine and to reverse the judgment of the lower court.

Respectfully submitted,

BRUCE RICH
LINDA STEINMAN
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8000

BRUCE J. ENNIS
KIT A. PIERSON
THERESA A. CHMARA
JENNER & BLOCK
21 Dupont Circle
Washington, D.C. 20036
(202) 223-4400

Attorneys for Amici Curiae

July 25, 1991

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R.A.V.,

Petitioner,

—v.—

CITY OF ST. PAUL, MINNESOTA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE MINNESOTA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, MINNESOTA CIVIL LIBERTIES UNION, AND AMERICAN JEWISH CONGRESS, IN SUPPORT OF PETITIONER

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Of Counsel:

Deborah Gilman
Minnesota Civil Liberties Union Foundation
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-3894

Mark R. Anfinson
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE CHALLENGED ORDINANCE IS UNCONSTITUTIONAL AS WRITTEN AND AS CONSTRUED 7

A. The Ordinance, As Written, Sweeps Within Its Ambit Whole Categories Of Protected Speech 7

B. The Ordinance, As Construed, Remains Constitutionally Invalid 11

II. THE FIRST AMENDMENT PROTECTS THE ADVOCACY OF IDEAS, EVEN WHEN THAT ADVOCACY CARRIES A MESSAGE OF RACIAL SUPREMACY, BUT THE FIRST AMENDMENT DOES NOT PREVENT THE STATE FROM PROSECUTING AN ACT OF CROSS BURNING DESIGNED TO THREATEN OR INTIMIDATE SPECIFIC AND IDENTIFIABLE VICTIMS 17

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Abrams v. United States,
250 U.S. 616 (1919) 17

Beauharnais v. Illinois,
343 U.S. 250 (1952) 19

Board of Airport Commissioners of Los Angeles v. Jews for Jesus,
482 U.S. 569 (1987) 12

Boos v. Barry,
485 U.S. 312 (1988) 10

Brandenburg v. Ohio,
395 U.S. 444 (1969) ..... *passim*

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 8, 12

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 16

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 4, 10, 11, 12

Cox v. Louisiana,
379 U.S. 536 (1965) 5, 14

Cramp v. Board of Public Instruction,
368 U.S. 278 (1961) 12, 14

FCC v. Pacifica,
438 U.S. 726 (1978) 9

Gooding v. Wilson,
405 U.S. 518 (1972) 11, 15

Page

Houston v. Hill,
482 U.S. 451 (1985) 6, 8, 10, 12

Hustler Magazine v. Falwell,
485 U.S. 46 (1985) 11

Lewis v. New Orleans,
415 U.S. 130 (1974) 6, 14, 15, 16

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) 22

Miller v. California,
413 U.S. 15 (1973) 14

NAACP v. Button,
371 U.S. 415 (1963) 8, 14, 19

NAACP v. Claiborne Hardware,
458 U.S. 886 (1982) 19, 20

New York Times v. Sullivan,
376 U.S. 254 (1964) 5, 22

New York v. Ferber,
458 U.S. 747 (1982) 10

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 13

Pipefitter Local Union No. 562 v. United States,
407 U.S. 385 (1972) 20

Rankin v. McPherson,
483 U.S. 378 (1987) 22

Rogers v. United States,
422 U.S. 35 (1975) 21

Secretary of State of Maryland v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 12

Page

Smith v. Goguen,
415 U.S. 566 (1974) 6, 13

State v. Miller,
629 P.2d 748 (Kan.App. 1981) 21

Terminiello v. Chicago,
337 U.S. 1 (1949) 18

Texas v. Johnson,
491 U.S. 397 (1989) 4, 18

United States v. Lee,
___ F.2d ___,
No. 90-5264 (8th Cir. June 10, 1991) 21

United States v. O'Brien,
391 U.S. 367 (1968) 10

United States v. Olson,
629 F.Supp. 889 (W.D.Mich. 1986) 21

Watts v. United States,
394 U.S. 705 (1969) 6, 18, 21, 22

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 9, 10

Whitney v. California,
274 U.S. 357 (1927) 17

Winters v. New York,
333 U.S. 507 (1948) 14

Statutes and Regulations

18 U.S.C. §241 . . . . . 6, 21

18 U.S.C. §871 . . . . . 21, 22

Page

Minn. Stat. §609.2231, Subd. 4 3

St. Paul City Ordinance §292.01 3

St. Paul City Ordinance §292.02 . . . . . 3, 4

Other Authorities

Tribe, L.,
American Constitutional Law (2d ed. 1988) 19

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Minnesota Civil Liberties Union (MCLU) is a statewide affiliate of the ACLU.[2]

This case raises issues of significant and longstanding concern to the ACLU and its affiliates. On the one hand, the ACLU has vigorously defended the right of all Americans to live wherever they choose without regard to race, and has repeatedly called on the government to intercede when that right is threatened. On the other hand, the ACLU has vigorously resisted efforts to curtail freedom of expression because the message conveyed may be unpopular or offensive.

The American Jewish Congress (AJC) is an organization of American Jews founded in 1918 to protect the political, civil, religious and economic rights of American Jews. Most of these rights can be effectively exercised only where Jews are free from physical intimidation or threats of violence motivated by anti-semitism or other forms of racism. The AJC applauds, therefore, governmental efforts to prosecute such crimes. The AJC also believes, however, that the laws employed in that effort are not exempt from the requirements of the Free Speech Clause of the First Amendment.

Striking the correct balance between these competing interests is a difficult and sensitive task. *Amici*

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] On June 10, 1991, this Court granted the MCLU's motion for leave to file an *amicus curiae* brief in support of the petition for *certiorari*.

respectfully submit this brief in the hope of assisting the Court as it considers where the appropriate constitutional lines can and should be drawn.

STATEMENT OF THE CASE

Petitioner is a juvenile. On the night of June 21, 1990, he was staying with a friend at 291 Earl Street in St. Paul, Minnesota. The government alleges that sometime between the hours of 1:00 a.m. and 3:00 a.m., petitioner and five others burned a cross on the front lawn of a black family that lived at 290 Earl Street.[3] The victimized family was the only black family living on the block. It included five children ranging in age from six months to nine years. Their father informed police that he was aroused by the sound of at least two voices in his front yard and saw the burning cross when he went to the window to investigate the noise.[4]

The cross he observed burning in his front yard was approximately two feet long in each direction. It was constructed from the legs of a broken chair, which were wrapped in terrycloth and doused with paint thinner. The government describes petitioner as a "central instigator" and "enthusiastic supporter" of the cross burning. Although it does not attribute any specific statement to petitioner himself, the government contends that petitioner and his cohorts had a general discussion prior to the cross burning about causing some "skinhead trouble" and "burning some niggers." The government also alleges that petitioner participated in two other cross burnings later that same evening, one across the street from 290 Earl Street, and one in an apartment complex a few blocks away where several other black families lived.

On June 25, 1990 -- four days after the incidents described above -- a delinquency petition was filed against petitioner in the Ramsey County Juvenile Court. The first count charged petitioner with fourth degree assault in violation of state law.[5] The second count charged petitioner with bias-motivated assault in violation of a local ordinance.[6] This second count was reduced to bias-motivated disorderly conduct in an amended petition filed on July 5, 1990. Specifically, petitioner was charged in the amended petition with violating St. Paul City Ordinance §292.02, which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed,

---

[3] This case arises on a motion to dismiss. *Amici* have, therefore, relied on the statement of facts set forth by respondent. *See* Brief in Opposition to the Petition for *Certiorari* ("Op.Cert.") at 2-6. At the same time, it is important to note that petitioner has denied the allegations against him. *See* Petition for *Certiorari* ("Cert.Pet.") at 3.

[4] There is some evidence in the record that the same family had suffered other acts of vandalism during the preceding months but no evidence linking petitioner or his associates to those acts.

[5] *See* Minn. Stat. §609.2231, Subd. 4.

[6] The bias-motivated assault charge rested on St. Paul City Ordinance §292.01. It states:

> Whoever, intentionally or with reckless disregard of so doing, puts another in fear of immediate bodily harm or death by placing on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which is reasonably understood as communicating threats of harm, violence, contempt, or hatred on the basis of race, color, creed, or religion or gender, commits an assault and shall be guilty of a misdemeanor.

religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Prior to trial, petitioner moved to dismiss the charge of bias-motivated disorderly conduct, arguing that the broad and sweeping language of §292.02 could not be sustained under the First Amendment. The trial court granted petitioner's motion in an order dated July 16, 1990. The Minnesota Supreme Court then accepted the state's accelerated appeal and, on January 18, 1991, reversed the decision of the trial court.

In remanding the case for trial, the Minnesota Supreme Court did not uphold the statute as written. To the contrary, it acknowledged that the "ordinance should have been more carefully drafted." 464 N.W.2d 507, 511 (1991). Nevertheless, it rejected petitioner's overbreadth argument by interpreting the ordinance to reach only expression that is unprotected by the First Amendment because it represents "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), or because it is intended and likely to produce "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The court's description of the "fighting words" doctrine begins by distinguishing the ordinance at issue here from the flag desecration statute struck down in *Texas v. Johnson*, 491 U.S. 397 (1989). Thus, the decision below emphasizes that the St. Paul ordinance only applies to "those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias." 464 N.W.2d at 510. What the decision below does not explain is whether all such "displays" qualify as "fighting words," in which event the court's purported limiting construction is in fact no narrower than the statute itself.

The court's discussion of the *Brandenburg* doctrine is equally brief, and consists of little more than a restatement of the *Brandenburg* holding. There is no explanation of how the facts of *Brandenburg* (which involved another cross burning) compare to the allegations in this case, or how the *Brandenburg* standard relates to the court's stated view that "[t]he burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy." 464 N.W.2d at 508 (footnote omitted). Finally, the decision below does not address when, if ever, the anticipated violence of a hostile audience can satisfy the *Brandenburg* standard and its intent requirement.

SUMMARY OF ARGUMENT

This case began with an act of racism and hatred that deserves condemnation by government at every level. But, in combatting such racism, government may not ignore the First Amendment principles that distinguish our constitutional system, and that have played such a large role in the still ongoing struggle for equal rights. *See, e.g., Cox v. Louisiana*, 379 U.S. 536 (1965).

The St. Paul ordinance violates those principles because its broad prohibitory language embraces whole categories of protected speech. As acknowledged by the court below, a ban on expressive activities that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender" cannot be reconciled with our society's commitment that "debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). At this stage of the proceedings, therefore, no one is claiming that the ordinance, as written, can be sustained.

Even as narrowed by the Minnesota Supreme Court, however, the ordinance remains constitutionally defective. First, the narrowing construction has rendered the ordinance unconstitutionally vague. In effect, the residents of St. Paul have been told that they have a right to engage in any speech that the Constitution protects but

have no right to engage in speech that is outside the First Amendment. As a matter of abstract principle, that statement is undoubtedly correct. As the basis for a criminal ordinance, it inevitably forces persons of common intelligence to guess at its meaning and act at their peril. This Court has correctly and consistently demanded greater specificity when First Amendment rights are at stake. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974).

Furthermore, to the extent that the Minnesota Supreme Court's doctrinal references are given meaning by reading its opinion as a whole, substantial overbreadth problems emerge. *See Lewis v. New Orleans*, 415 U.S. 130 (1974). Those problems reflect the difficulties inherent in attempting to "save" through judicial interpretation an ordinance that is so fundamentally flawed. *Amici* respectfully submit that this is an ordinance that simply cannot be "saved." It should, therefore, be declared facially invalid, as this Court has done on similar occasions in the past. *E.g., Houston v. Hill*, 482 U.S. 451 (1985).

At the same time, the flaws in this particular ordinance do not mean that St. Paul and other communities throughout the country can never penalize what this Court has described as a "true" threat. *Watts v. United States*, 394 U.S. 705, 708 (1969)(*per curiam*). However, any attempt to define a "true" threat must be sensitive to First Amendment values. Thus, the advocacy of ideas is protected by the First Amendment, no matter how offensive or unpopular those ideas may be. On the other hand, the First Amendment does not protect the right to threaten specific victims when the threat is intended by the speaker to instill an imminent fear of violence and would be understood by a reasonable listener in those terms. For example, a threat to physically assault someone who exercises the right to vote is surely outside the scope of First Amendment protection. *See, e.g.*, 18 U.S.C. §241.

Amici do not contend these distinctions are easy to draw. They are the distinctions that the Constitution demands.

ARGUMENT

I. THE CHALLENGED ORDINANCE IS UNCONSTITUTIONAL AS WRITTEN AND AS CONSTRUED

Amici recognize that the challenged ordinance has been substantially narrowed by the Minnesota Supreme Court and that its construction of state law is authoritative. Nevertheless, the validity of the narrowing construction cannot be assessed without first considering the breadth of the original enactment. The process of judicial construction works best when the distance to be travelled from an unconstitutional ordinance to a constitutional one is relatively small. When the distance is enormous, as it was in this case, the effort to save the ordinance from invalidation inevitably substitutes one set of constitutional problems for another.

That is precisely the dilemma created by the decision below. The problems of vagueness and overbreadth have not gone away; they have merely been reformulated. *Amici* respectfully submit that the correct response to this dilemma -- from the perspective of constitutional theory and democratic governance -- is to return the matter to the St. Paul City Council for its reconsideration under appropriate guidelines set forth by this Court.

A. The Ordinance, As Written, Sweeps Within Its Ambit Whole Categories Of Protected Speech

Petitioner was charged with violating a St. Paul ordinance that prohibits the display, on *any* public or private property, of *any* "symbol, object, appellation, charac-

terization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender . . . ." This sweeping language has been condemned as unconstitutional by every judge to review this case. Even respondent no longer defends it. In this Court, therefore, it is undisputed that the challenged ordinance cannot be sustained in any form that remotely resembles what the city council actually adopted.

It is an axiom of First Amendment jurisprudence that laws regulating expression must be narrowly drawn so that they do not stray beyond the particular evil to be controlled. A statute restricting expression is overbroad if it fails to respect this rule; if, in other words, it sweeps within its reach a significant amount of protected speech along with expression that may legitimately be regulated. *See, e.g., Houston v. Hill*, 482 U.S. at 458-60; *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

As written, the challenged ordinance falls far short of the specificity required by the First Amendment. By its very terms, the ordinance targets only communicative activity. Moreover, the communicative activity is prohibited only because of the message it conveys. The prohibited message, in turn, is defined in the broadest possible terms. The only limiting condition is that the speaker must know or have "reasonable grounds to know" that the expression is of the sort that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."

The reach of this prohibition is extraordinary. It potentially applies to virtually all symbolic speech addressing issues of race, color, creed, religion, or gender. It also reaches beyond the symbolic to embrace pure speech as well. For example, a resident of St. Paul who

erected a billboard on his own property expressing his own view that women belonged at home rather than at work could easily be subject to prosecution under the literal terms of this ordinance. Even more extraordinarily, the victims in this case would be facing prosecution if they responded to the cross burning by placing a sign on his front lawn condemning white racism.

There is no doubt that these political views, however popular or unpopular they may be, are fully protected by the First Amendment. In the frequently quoted words of Justice Jackson:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

Few would dispute that the protection of minorities that have been victimized by discrimination for much of our history warrants the most forceful response from every level of government. But even such fundamental obligations of government cannot be accomplished by the wholesale exclusion of certain topics from the rough and tumble of public debate. "As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be." *Id.* at 641. For that reason, our constitutional system prohibits the suppression of speech if it is only "the speaker's opinion that gives offense," *FCC v. Pacifica*, 438 U.S. 726, 745 (1978).

Here, the plain language of the St. Paul ordinance unambiguously demonstrates that its drafters were motivated by their desire to suppress "offensive" opinions. Thus, this is not a case where "the governmental interest is unrelated to the suppression of free expression,"

United States v. O'Brien, 391 U.S. 367, 376 (1968). To the contrary, the impact of the ordinance on protected speech is both direct and intentional. To be sure, the ordinance was prompted by laudable aims. However, even legitimate goals cannot be achieved through overbroad limits on protected speech. *See Houston v. Hill*, 482 U.S. 451. The explanation goes to the heart of our notions of political legitimacy. "Authority [in this country] is to be controlled by public opinion, not public opinion by authority." *Barnette*, 319 U.S. at 641.[7]

Nor is this a case where the overbreadth of the ordinance can be dismissed as marginal or theoretical. *Compare New York v. Ferber*, 458 U.S. 747 (1982). By any objective measure, its unconstitutional reach dwarfs its constitutional applications. In its effort to preserve as much of the statute as it possibly could, the Minnesota Supreme Court identified only two applications that even conceivably satisfied constitutional standards: fighting words, *see Chaplinsky v. New Hampshire*, 315 U.S. 568; and speech that is both intended and likely to produce imminent lawless action, *see Brandenburg v. Ohio*, 395 U.S. 444.

As described more fully below, *amici* do not believe that this limiting construction is sufficient to rescue the ordinance from invalidity. *See* Point IB, *infra*. It does, however, convincingly demonstrate the failure of the legislature to enact an ordinance that even remotely approaches the close fit between means and ends that the Constitution demands when regulating speech. Whatever else one might say about the *Chaplinsky* and *Brandenburg* standards, they have rarely been met in the reported cases. By contrast, one need only open the daily paper to see how much protected speech has the potential to arouse "anger, alarm or resentment" on the basis of race, color, creed, religion, or gender.

[7] Because most expression covered by the ordinance is constitutionally protected, and because the ordinance has a significant potential to restrict such expression directly rather than as an incidental consequence of the legitimate regulation of other conduct, the ordinance as written cannot be upheld unless it survives "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988). It plainly cannot, as even the court below acknowledged.

The danger to First Amendment values presented by any ordinance that sweeps this broadly was cogently set forth in *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1985). Rejecting a First Amendment standard that hinged on the "outrageousness" of the disputed comment, Chief Justice Rehnquist wrote for a unanimous Court:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Precisely the same reasoning applies in this case and explains why the challenged ordinance is substantially overbroad in its originally enacted form. At this stage of the proceedings, no one seriously claims otherwise.

B. The Ordinance, As Construed, Remains Constitutionally Invalid

Faced with an ordinance that was facially unconstitutional in its overbroad attempt to regulate speech, the Minnesota Supreme Court chose to adopt a narrowing construction purportedly based on this Court's decisions in *Chaplinsky* and *Brandenburg*. That interpretation of state law is authoritative and must be accepted by this Court. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972);

Cramp v. Board of Public Instruction, 368 U.S. 278, 285 (1961). This Court need not accept, however, the Minnesota Supreme Court's determination that the ordinance, as narrowed, is constitutionally valid. In fact, serious problems of overbreadth and vagueness remain.

In urging this Court to reverse the decision below, *amici* are mindful of this Court's admonition that a judicial order declaring a statute unconstitutional on its face is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. at 613. Yet, the Court has never confused this admonition with an injunction. Thus, this Court has continued to recognize that some enactments are so extreme in their disregard of constitutional boundaries, provide so little foundation for a saving construction, and inhibit such substantial areas of constitutionally protected expression, that they simply cannot be redeemed through judicial interpretation. *See, e.g., Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987); *Houston v. Hill*, 482 U.S. 451; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

In these cases and others like them, the Court could have adopted a limiting construction similar to the one embraced by the Minnesota Supreme Court.[8] However, as this Court implicitly recognized, such an approach would fatally undermine the overbreadth doctrine. It would also erode the system of political accountability by

[8] The Minnesota Supreme Court acknowledged these cases but distinguished them on the ground that the statutes under review were not susceptible to a limiting construction. 464 N.W.2d at 510 n.3. This purported distinction is without merit because it misunderstands the nature of this Court's concern. Had it chosen to do so, the Court could have ruled in *Jews for Jesus* that the airport regulation prohibiting "all First Amendment activity" only applied if the *Chaplinsky* or *Brandenburg* standards were met. In declining to do so, the Court was not limited by the language of the regulation but, rather, by its own sense of the appropriate judicial response to a rule that, on its face, so clearly exceeds permissible First Amendment limits.

encouraging legislators to avoid hard value judgments by relying on the judiciary to provide substantive content to obviously vague and overbroad statutes.

The difficulties inherent in asking the judiciary to perform this essentially legislative task are exemplified by the present case. In effect, the Minnesota Supreme Court has created an ordinance that says, "fighting words are illegal." Yet, neither the ordinance that remains on the books nor the Minnesota Supreme Court decision provide any meaningful guidance on what that standard means or how it relates to the law's original ban on speech that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."

Certainly, one possible interpretation of the decision below is that any speech that violates the statutory language also represents the sort of "fighting words" that the Minnesota Supreme Court intends to condemn. However, if that is so, then the limiting construction adopted by the Minnesota Supreme Court is in fact no more limited than the statutory language it purports to construe. Conversely, if the judicial standard developed by the Minnesota Supreme Court is meant to be different than the legislative standard enacted by the St. Paul City Council, it is fair to ask where the differentiations lie. That question was neither asked nor answered by the Minnesota Supreme Court's opinion.

As this Court has often noted, a statute is unconstitutionally vague when persons of common intelligence are left to guess at its meaning. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Accordingly, the Court has repeatedly held that a criminal statute must give adequate warning of the conduct it prohibits, and must set out explicit standards to guide those who enforce it. *Id.* The Court has also stressed that the need for specificity is especially great when First Amendment rights are at stake. *See Smith v. Goguen*, 415 U.S.

at 573. The decision below largely disregards these critical lessons.

Perhaps the Minnesota Supreme Court believed that the vagueness problems inherent in the ordinance were resolved because it couched its opinion in terms of familiar constitutional doctrines. If so, it was mistaken. It is not enough, for example, to say that obscenity is prohibited. The prohibited conduct "must be specifically defined by the applicable state law, as written or authoritatively construed." *Miller v. California*, 413 U.S. 15, 24 (1973)(footnote omitted). Likewise, it is not enough to say that "fighting words" are prohibited when the rest of the statute that might give context to that phrase has been declared unconstitutional.[9]

In addition to the trap it presents to the unwary, the unelaborated reference to "fighting words" and the Brandenburg standard also invites abuse by law enforcement officials. "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague . . . statute lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. at 435. In this case, it does not take much foresight to predict that the charge of "fighting words" is more likely to be made when those doing the speaking are outside the political mainstream. The inevitable, and constitutionally unacceptable, result is self-censorship.

Finally, the limiting construction adopted by the Minnesota Supreme Court continues to be plagued by problems of overbreadth. The nature of those problems is best illustrated by the decision in *Lewis v. New Orleans*, 415 U.S. 130. The defendant in *Lewis* was charged with violating a local ordinance that made it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to" any police officer. Following a remand for reconsideration in light of *Gooding v. Wilson*, 405 U.S. 518, the Louisiana Supreme Court ruled that the statutory language only applied to "fighting words uttered to specific persons at a specific time . . . ." *Lewis*, 415 U.S. at 131.

Given that interpretation, the statute this Court ultimately considered in *Lewis* was virtually identical in scope to the St. Paul ordinance, as it has now been construed. Contrary to the approach advocated by respondent in this case, however, the *Lewis* Court did not regard the overbreadth issue as settled by a barebones reference to the fighting words doctrine. Instead, it read the opinion of the Louisiana Supreme Court as a whole and concluded:

> That the Louisiana Supreme Court contemplated a broader reach of the ordinance is evident from its emphasis upon the city's justification for [its] regulation . . . [According to the Louisiana Supreme Court], "permitting the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty would be unreasonable and basically incompatible with the officer's activities and the place where such activities are performed."

415 U.S. at 132 (citation omitted). Based on that explanation, this Court held that the challenged ordinance "is overbroad in violation of the First and Fourteenth Amendments and is therefore facially invalid." *Id.* at 131-32.

---

[9] This Court has frequently invalidated statutes on vagueness grounds despite a purported limiting construction by the state's highest court. *See, e.g., Cox v. Louisiana*, 379 U.S. at 551; *Cramp v. Board of Public Instruction*, 368 U.S. at 287; *Winters v. New York*, 333 U.S. 507, 518-19 (1948).

The opinion of the Minnesota Supreme Court suffers from a similar defect. As in *Lewis*, the reference to fighting words and *Brandenburg* in the decision below can only be understood in context. Specifically, the purported limiting construction adopted by the Minnesota Supreme Court is necessarily colored by its view that "[t]he burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy." 464 N.W.2d at 508 (footnote omitted). To the extent that the reference to the burning cross as "an unmistakable symbol of violence and hatred" is meant to suggest that every burning cross can be proscribed under either the fighting words doctrine or the *Brandenburg* standard, even the reconstructed ordinance is dramatically overbroad. *See* Point I, *supra*. To the extent that this implication was not intended by the Minnesota Supreme Court, the meaning of its decision is necessarily in doubt, and those seeking guidance from the decision are left to act at their own peril.

The inability of the Minnesota Supreme Court to craft a narrowing construction of the St. Paul ordinance that meets constitutional standards does not mean that the goal of curtailing unprotected threats cannot be achieved. It does suggest that the problems in this ordinance are too fundamental to be resolved on a piecemeal basis. Notwithstanding this Court's preference for case-by-case adjudication, *see Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985), *amici* respectfully suggest that the St. Paul ordinance is so fatally flawed, even as construed, that it can and should be declared facially invalid. The decision to reexamine the issues addressed by this ordinance will then return where it belongs -- to the political branches. *Amici* believe that any subsequent debates must be guided by the principles set forth below.

II. THE FIRST AMENDMENT PROTECTS THE ADVOCACY OF IDEAS, EVEN WHEN THAT ADVOCACY CARRIES A MESSAGE OF RACIAL SUPREMACY, BUT THE FIRST AMENDMENT DOES NOT PREVENT THE STATE FROM PROSECUTING AN ACT OF CROSS BURNING DESIGNED TO THREATEN OR INTIMIDATE SPECIFIC AND IDENTIFIABLE VICTIMS

This society has rested its faith on the proposition that "the remedy [for speech] is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J. concurring). Accordingly, our constitutional tradition demands that even a message of racial supremacy is entitled to be heard so long as it remains in the realm of advocacy. Those who articulated this faith in public debate were not naive about the power of words or symbols. To the contrary, they believed that pernicious ideas were more dangerous when suppressed than when exposed. As students of history, they also doubted the wisdom of vesting government officials with the power to declare certain ideas illegal.[10]

This Court has shared that belief. Thus, in *Brandenburg v. Ohio*, 395 U.S. 444, the Court rejected the notion that the Klan's hateful views on racial supremacy can be subject to criminal prosecution if expressed through the burning of a cross at a political rally. Two years ago, this Court similarly held that the First Amendment protects the act of burning the flag as a sign of political protest no matter how offensive it might be to some who

---

[10] *See Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting)("when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . .").

observed it and, indeed, even if the purpose of the protest was to stir resentment. *Texas v. Johnson*, 491 U.S. 397.[11]

Conversely, what this Court described as a "true" threat in *Watts v. United States*, 394 U.S. at 708 has never been entitled to constitutional protection. In deciding what constitutes a "true" threat, moreover, there is no reason in law or logic that a message that would be subject to criminal sanction if delivered in words is somehow immunized from punishment by the state if communicated symbolically. The use of symbols rather than words may complicate prosecution for the simple reason that symbols are inherently more ambiguous than words. Properly understood, however, that complication reflects a problem of proof and not principle. To choose one example, extortion is unlawful whether the threat of violence is communicated in words or by delivering a dead fish to the victim's door.

The petitioner in this case is accused of burning a cross in the middle of the night on the front lawn of the only black family living on a residential block in St. Paul, Minnesota, after petitioner allegedly participated in discussions that included references to causing some "skinhead trouble" and "burning some niggers." It is undisputed that if these allegations are proven at trial petitioner's conviction for such content-neutral crimes as trespass or vandalism would raise no constitutional issue.

Amici believe it is equally clear that the state's legitimate concerns go beyond the interest in preventing trespass and vandalism. Specifically, *amici* believe that the state may punish threats and intimidation but, in doing so, the state must act according to the sort of carefully

---

[11] *See also Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)(free speech may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

crafted rules suggested below, which are designed to preserve the "breathing space" that First Amendment freedoms need "to survive." *NAACP v. Button*, 371 U.S. at 433. Indeed, *amici* believe that the state has an affirmative obligation to protect its citizens against genuine threats or intimidation that are designed to interfere with the exercise of the victim's own civil or constitutional rights.

Faced with the difficult but constitutionally compelled task of distinguishing between racially charged rhetoric and actionable threats, certain limiting principles must be kept in mind. Most fundamentally, any attempt to prosecute speech (or expressive activity) because of its allegedly threatening character must depend on a showing that the alleged threat was directed at a specific victim or victims.[12] It is undoubtedly true that generalized comments disparaging particular groups can often be perceived as threatening or intimidating, especially if those belonging to the disparaged group see themselves as vulnerable members of society. But it is equally true that generalized comments can often be answered through debate in a way that targeted threats against specific individuals simply cannot.[13]

The distinction between threats that are focused on specific individuals and unfocused threats that, in the heat of the moment, can often be part of the advocacy of ideas, is essential to understanding this Court's decision in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). Although *Claiborne Hardware* was a civil action rather than a criminal prosecution, it raised many of the

---

[12] As explained below, this is a necessary but not sufficient condition.

[13] This distinction is not a novel one. Our First Amendment jurisprudence permits individual libel actions with appropriate safeguards. Group libel actions have been generally discredited notwithstanding the decision in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). *See, e.g.*, L. Tribe, *American Constitutional Law* 926 n.42 (2d ed. 1988).

same line-drawing problems presented by this case. In particular, the plaintiffs in *Claiborne Hardware* based their claim for damages, in part, on the assertion that Charles Evers, who was then a representative of the NAACP, had told a rally of supporters that anyone who "broke the boycott" organized by the NAACP against white merchants would "have their necks broken." 458 U.S. at 900 n.28. Plaintiffs contended that this "threat" was unprotected by the First Amendment and had directly led to the economic injury they allegedly suffered.

This Court disagreed. While not explicitly referring to the generalized nature of Evers' remarks, a unanimous Court wrote: "Strong and effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *Id.* at 928. Applying the *Brandenburg* test, the Court then held: "When such appeals do not invite lawless action, they must be regarded as protected speech." *Id.*

Amici believe that *Claiborne Hardware* was correctly decided. But *amici* also believe that different values are at stake when the threat is directed toward a specific victim. Under those circumstances, the state has an additional interest in protecting its citizens against the reasonable fear that they may be subject to violence unless they submit to the demands of whoever is threatening them.[14] Moreover, in contrast to the *Brandenburg* test, which was developed to deal with group exhortations, *amici* do not believe that proof of a "true" threat should depend on a showing that violence (as opposed to the fear of violence) is "imminent." For example, *amici*

[14] *See, e.g., Pipefitter Local Union No. 562 v. United States*, 407 U.S. 385, 422 (1972)(interpreting the term "threat" in §205 of the Federal Election Campaign Act as "includ[ing] the creation of an appearance of an intent to inflict injury").

believe that the statement, "we will break your legs if you dare to vote next week," could be prosecuted by the government upon a showing that it represents a deliberated and believable threat against a specific victim.[15]

Amici do not suggest that the reasonable apprehension of fear alone is a sufficient predicate for criminal prosecution. Because we are dealing with speech, *amici* believe that the state must carry the additional burden of proving that "the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Rogers v. United States*, 422 U.S. 35, 48 (1975)(Marshall, J., concurring).[16] Thus, "words uttered as mere political argument, idle talk or jest," *United States v. Olson*, 629 F.Supp. 889, 894 (W.D.Mich. 1986),

[15] Depending upon the context, such a statement might well violate 18 U.S.C. §241, which makes it a crime to "conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . ."

The issue of context is obviously key in these situations. For example, in *United States v. Lee*, ___ F.2d ___, No. 90-5264 (8th Cir. June 10, 1991), the Eighth Circuit recently divided on the question of whether a cross burning that took place on a hill nearly four hundred feet away from an apartment complex with several black families could be prosecuted as a "threat" under 18 U.S.C. §241. Similarly, in *State v. Miller*, 629 P.2d 748, 751 (Kan.App. 1981), the court held that cross burning is not "per se a terroristic threat as prohibited" by state law but that "the surrounding facts and relationship of the parties involved may be such that . . . the burning of a cross on the property of another is the communication of a terroristic threat."

[16] *Amici* recognize that the majority of courts have held that the state need not prove that the defendant intended a threat to the President in order to bring a prosecution under 18 U.S.C. §871. But, as Justice Marshall pointed out in *Rogers*, 422 U.S. at 43, this Court has expressed its "grave doubts" about the correctness of the so-called objective test for determining a threat. *See Watts v. United States*, 394 U.S. at 707. *Amici* share those doubts in the context of a criminal prosecution.

cannot be subject to criminal prosecution. Likewise, "political hyperbole" cannot be made actionable even when aimed at a specific public figure. *Watts v. United States*, 394 U.S. at 708.[17]

In *Watts* itself, the Court overturned the conviction of a student protestor who said, in the course of an anti-war demonstration: "If they ever make me carry a rifle the first man I would get in my sights is L.B.J." *Id.* at 706.[18] The decision in *Watts* rested on statutory interpretation grounds. However, the Court's interpretation of the statutory reference to "threat[s]" was measured against "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.*, *quoting New York Times Co. v. Sullivan*, 376 U.S. at 270.[19]

It is tempting to say that the message conveyed by even the public burning of a cross during a political rally is so offensive, so hurtful, and so antithetical to the ideal of equality, that it ought to be subject to prohibition without the need for rigorous scrutiny of whether it crosses some First Amendment line from protected advocacy to unprotected threats or intimidation. The Constitution, however, does not tolerate such shortcuts.

---

[17] *Amici* do not address whether there are interests other than preventing threats of violence that can justify content-based restrictions on expression. *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual harassment may state a claim for relief under Title VII).

[18] The defendant was convicted under 18 U.S.C. §871, which makes it a crime to "knowingly and willfully . . . [make] any threat to take the life or to inflict bodily harm upon the President of the United States."

[19] *Cf. Rankin v. McPherson*, 483 U.S. 378 (1987)(holding that government employee cannot be dismissed for commenting favorably on the Reagan assassination attempt in a private conversation).

At the same time, it would be wrong to ignore the undeniable fact that our history is replete with unfortunate incidents in which unpopular groups (whether their unpopularity was based on race, religion, ethnicity, gender, sexual preference, or political belief) were coerced into forfeiting their constitutional rights because of threats or intimidation that often went unremedied and, during more disgraceful periods, were tacitly condoned.

The task facing our nation is to promote the values of both free speech and equality without sacrificing either. As noted in Point I, that goal has not been met by the St. Paul ordinance at issue in this case.

CONCLUSION

For the reasons stated herein, the decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

Steven R. Shapiro
(*Counsel of Record*)
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Of Counsel:
Deborah Gilman
Minnesota Civil Liberties Union Foundation
Minneapolis, Minnesota 55411
(612) 522-3894

Mark R. Anfinson
Lake Calhoun Professional Building.
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

Dated: July 25, 1991

Supreme Court, U.S.
FILED
JUL 25 19
OFFICE O

NO. 90-7675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

R. A. V.,
Appellant,

v.

CITY OF ST. PAUL, MINNESOTA,
Appellee.

BRIEF OF AMICUS CURIAE PATRIOT'S DEFENSE FOUNDATION, INC. IN SUPPORT OF THE APPELLANT, R. A. V.

CHARLES R. SHEPPARD
Attorney at Law
561 Greene Street
Augusta, Georgia 30901
(404) 724-8384
Georgia Bar Number 641938
Attorneys for Petitioners

Alpha Law Brief Co. — 6113 Aletha Lane — Houston, Texas 77081 — 789-2000

NO. 90-7675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

R. A. V.,
Appellant,

v.

CITY OF ST. PAUL, MINNESOTA,
Appellee.

BRIEF OF AMICUS CURIAE PATRIOT'S DEFENSE FOUNDATION, INC. IN SUPPORT OF THE APPELLANT, R. A. V.

I. The Interest of Amicus Curiae, Patriots' Defense Foundation, Inc.

The Patriot's Defense Foundation, Inc. (the Foundation) hereby files this amicus curiae brief, it having obtained the written consent for doing so from both counsel for the Appellant, R.A.V., and the Appellee, the City of St. Paul, Minnesota.

The Foundation is a public interest legal assistance organization headquartered in Houston, Texas and which has its address at 2323 McCue, Suite 2, Houston, Texas 77056. It seeks to protect the vital First Amendment rights of political activists and spokespersons who advocate the ideology that the United States should remain a predominantly Christian, Anglo-Saxon and European derived nation with all that proposition entails in terms of cultural, social and religious norms. Nevertheless, the Foundation supports the right of every person within the geographic boundaries of the United States of America to freely express his or her opinion on social, political or racial issues in an unfettered manner regardless of that persons racial or religious background or political affiliation. The Foundation considers an ordinance such as that at issue in this case to be a mortal danger to this right.

II. Argument

The Foundation at the outset states its firm belief that any individual, whatever his or her political belief or affiliation, religious background and/or racial or ethnic background, should be prosecuted and punished in accord with fundamental principles of due process if that person commits what has traditionally been considered to be a crime against the person or property. Its objection to statutes of this nature is that punishing the person for the offending act proscribed therein is inextricably bound up with chastising that person for his social, political or racial beliefs, governmental action that has heretofore been proscribed by the First Amendment. More importantly, laws of this nature have a definite tendency to criminalize acts of politically expressive

conduct which have traditionally been accorded First Amendment protection. Statutes such as the one at issue herein undoubtedly also open wide the gate to politically discriminatory prosecutions which clearly contravene basic principles of the Bill of Rights and the Fourteenth Amendment.

The ordinance purports to punish anyone who places on public or private property, among other things, a burning cross or swastika when that person has reasonable grounds for believing that such a display will elicit an adverse reaction from other people on the basis of race, color, creed, religion, or gender. . . ." To the extent that the act purports to outlaw politically expressive conduct for the principal reason that such expression disturbs the emotional equilibrium of those who see or hear such expression, it certainly contravenes several well established precedents of this Court in the area of First Amendment jurisprudence. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*,____U.S.____, 109 S. Ct. 2533, 2544, 105 L.Ed.2d 342 (1989).

> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stir people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*,

> supra, 315 U.S. at pages 571-572, 62 S. Ct. at pages 571-572, 62 S. Ct. at page 769. 86 L.Ed. 1031, is nevertheless protected against censorship or punishment unless it is shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. *See Bridges v. California*, 314 U.S. 252, 262, 62 S. Ct. 190, 193, 86 L.Ed. 192, 159 ALR 1346; *Craig v. Harney*, 331 U.S. 367, 373, 67 S. Ct. 1249, 91 L.Ed. 1546. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. *Terminello v. City of Chicago*. 337 U.S. 1, 4-5 (1949)

There can be no question but that the city of St. Paul, by enacting this ordinance, is attempting to standardize what it considers to be the "politically correct" expression of ideas concerning intergroup relations that a vast majority of its inhabitants in all probability consider to be moral, just and right. It is doing so by outlawing the display of symbols that cause "resentment" on the part of racial, ethnic or religious groups who are offended by such a display. In effect, one group is being given veto power over another individual's right to freedom of expression because such expression hurts the feelings of the members of the offended group. A notion more foreign to our basic concept of constitutional liberties can scarcely be imagined.

More invidious, however, is the effect of this and similar statutes in putting the alleged perpetrator on trial not only for what he has supposedly done, but for what he beileves. Indeed, the two prominently mentioned examples of prohibited acts—burning a cross and

displaying a Nazi swastika—leave little doubt as to what category of political dissidents is the target of this ordinance. Significantly, the Court has held that the right to believe in and subscribe to unconventional and unpopular ideas cannot be divorced from the right to freely and publicly express them:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969).

In effect, the Court has said that to punish the expression of a controversial idea, when such expression does not amount to an incitement to imminent lawless action, is the functional equivalent of punishing the individual who articulates it for believing in or adhering to it. This ordinance has precisely the effect of punishing a person more for the contents of his thoughts than it does for chastising him for the social damaging effect of his acts and it therefore constitutes a direct and impermissible burden on vital First Amendment rights.

Racism and anti-semitism may very well be the serious social problems that many observers believe them to be. Nevertheless, government has no business even indirectly attempting to punish persons for the contents of their thoughts no matter how obnoxious men of good will may consider them to be. In 1969 this Court held in *Stanley v. Georgia,* 394 U.S. 557, 566 (1969) "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." If burning crosses or swastika should be banned from public display because these symbols cause "anger, alarm and resentment" to arise in the minds of members of certain ethnic or religious groups, then should not government be allowed to prohibit racist and anti-semitic books, magazines and newspapers from being openly sold in bookstores and on newsstands for the same reason? Where is the line to be drawn concerning such censorship?

No terrorist or criminal should be excused from paying the penalty for his criminal act because he was motivated by ideological or, to his mind, altruistic reasons to commit the offense. On the other hand, there is absolutely no reason why a person who commits a crime for political or ideological reasons should receive a more severe criminal sanction for that reason than a person who commits a similar act on account of covetousness, greed, a desire for revenge, generalized malevolence or for some other base reason.[1] Crime is crime and the

1. Amicus curiae realizes that the ordinance at issue herein provides only for misdemeanor punishment. Nevertheless, it is its firmly fixed belief that if this statute is upheld by this Court, the inevitable tendency of many legislative bodies will to make so-called "hate crimes" felony offenses or otherwise provide for more severe penalties for incidents that in many instances would otherwise be nothing more than police court crimes if there were no ideological or racial aspect to them. Once this sub-category of crime is validated by an opinion of this Court, there will be no meaningful restraint that can be imposed on lawmakers in creating crimes of this nature and in setting the penalties for them. Just this term the Court has strongly endorsed the principle that the states have a considerable amount of latitude in setting penalties for what they consider to be serious criminal offenses. See *Harmelin v. Michigan,* Case No. 89-7272, decided June 27, 1991.

person who rends the fabric of our society by committing an act that any reasonable person would consider to be criminal should be prosecuted and punished. Nevertheless, no criminal statute in this country should be enacted which assesses a putatively criminal act from the standpoint of prevailing ideological trends or which authorizes an inquiry into the mind of the alleged perpetrator in order to ascertain whether he was thinking forbidden, unpopular thoughts at the time that he purportedly committed the offense. To the extent that racial and religious violence is a serious concern in our society, there is every reason to believe that our existing criminal laws and civil sanctions are more than adequate to deal with the problem. There is absolutely no need for our federal, state and local legislatures to venture into the First Amendment quagmire that the city of St. Paul would have them beckoned into if this Court was to uphold the constitutionality of this legislation.

III. Summary of Argument

The ordinance at issue is irreparably overbroad in that it criminalizes politically expressive conduct that has consistently been afforded the protection of the First Amendment. Moreover, it clearly seeks to punish individuals for the unorthodox nature of their thoughts and

affiliations by making criminal the manner in which they express and publicly identify with these thoughts and affiliations. The inevitable result of legislation of this nature is to punish not only the purportedly anti-social act which may or may not be a crime in the manner in which we have traditionally understood the nature of criminal conduct, but also to punish the alleged perpetrator on account of his or her matrix of political and social beliefs which may very well have been a catalyst in causing that person to engage in the conduct at issue Such a category of ideologically defined crimes is inimical to basic First Amendment values, particularly when our traditional system of ideologically neutral criminal laws and civil sanctions is more than adequate to deal with the problems posed by racial, religious and ethnically oriented crime.

IV. Conclusion

Amicus curiae Patriot's Defense Foundation, Inc. urges the Court to strike down the ordinance under which the Appellant is being prosecuted as being in flagrant violation of the First Amendment guarantee of freedom of speech and expression, and to then remand the case to the Minnesota appellate courts for proceedings consistent with such a holding.

This 24th day of July, 1991.

Respectfully submitted,

PATRIOT'S DEFENSE
FOUNDATION, INC.
2323 McCue Road, Suite No. 2
Houston, Texas 77056
(713) 439-0328 Office
(713) 439-1562 Facsimile

By: _____

CHARLES R. SHEPPARD
Attorney for the Foundation
561 Greene Street
Augusta, Georgia 30901
(404) 724-8384
Georgia Bar Number 641938

FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Minnesota

BRIEF OF THE STATES OF MINNESOTA, ALABAMA, ARIZONA, CONNECTICUT, IDAHO, ILLINOIS, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, VIRGINIA AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

525 Park Street, Suite 200
St. Paul, Minnesota 55103
Telephone: (612) 296-6473

Counsel for Amicus Curiae
State of Minnesota

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ADDITIONAL COUNSEL FOR AMICI STATES

JIMMY EVANS
Attorney General
State of Alabama

GRANT WOODS
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

JOHN J. KELLY
Chief State's Attorney
State of Connecticut

LARRY ECHOHAWK
Attorney General
State of Idaho

ROLAND W. BURRIS
Attorney General
State of Illinois

ROBERT T. STEPHAN
Attorney General
State of Kansas

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

SCOTT HARSHBARGER
Attorney General
Commonwealth of
Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

ROBERT J. DEL TUFO
Attorney General
State of New Jersey

LEE I. FISHER
Attorney General
State of Ohio

SUSAN B. LOVING
Attorney General
State of Oklahoma

T. TRAVIS MEDLOCK
Attorney General
State of South Carolina

CHARLES W. BURSON
Attorney General
State of Tennessee

MARY SUE TERRY
Attorney General
Commonwealth of
Virginia

PAUL VAN DAM
Attorney General
State of Utah

TABLE OF CONTENTS

Page

Statement of Interest 1

Summary of Argument 2

Argument 4

I. States Have a Compelling Interest in Prohibiting Bias-Motivated Activity That Is Directed at and Harmful to Individual Citizens..... 4

II. There Is a Range of Bias-Motivated Activity That May Be Prohibited Without Infringing First Amendment Rights 13

III. As Narrowly Construed by the Minnesota Supreme Court, the Saint Paul Ordinance Is Valid..... 20

Conclusion 30

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. 1 ..... *passim*

U.S. Const., amend. 13 5

U.S. Const., amend. 14 5

Ariz. Const. §§ 12 and 13 5

STATUTES

18 U.S.C. § 241 (1988) 16, 19

18 U.S.C. § 242 (1988) 5

42 U.S.C. § 1981 (1988) 5

42 U.S.C. § 1982 (1988) 5

42 U.S.C. § 1985(3) (1988) 5

42 U.S.C. § 2000a *et seq.* (1988) 5

42 U.S.C. § 2000c *et seq.* (1988) 5

42 U.S.C. § 2000e *et seq.* (1988) 5

Cal. Penal Code §§ 422.6-422.9 (West 1988) 5, 15

Fla. Stat. §§ 876.17-.18 (1989) 17

Ga. Code Ann. § 16-7-26 (Michie 1988) 17

Hate Crime Statistics Act, Pub. L. 101-275, 104 Stat. 140 (1990) 7

Ill. Ann. Stat. § 12-7.1 (Smith-Hurd Supp. 1991) 15

Minn. Stat. ch. 363 (1990) 5

Minn. Stat. § 609.72, subd. 1(3) (1990) 26

TABLE OF AUTHORITIES – Continued

Page

Ohio Rev. Code Ann. § 2927.12 (Anderson 1987) 15

R.I. Gen. Laws § 11-42-3 (Supp. 1990) 14

Va. Code Ann. § 18.2-423 (1988) 17

CASES

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 26

Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456 (1991) 18, 20

Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 22

Bob Jones University v. United States, 461 U.S. 574 (1983) 6

Brandenberg v. Ohio, 395 U.S. 444 (1969) 4, 21, 23, 24

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 21

Brown v. Board of Education, 347 U.S. 483 (1954) 6

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) *passim*

City of Houston v. Hill, 482 U.S. 451 (1987) 22, 25

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 20

Cohen v. California, 403 U.S. 15 (1971) 25

Colten v. Kentucky, 407 U.S. 104 (1972) 19

Cox v. Louisiana, 379 U.S. 559 (1965) 26

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 26

TABLE OF AUTHORITIES – Continued

Page

Gooding v. Wilson, 405 U.S. 518 (1972) 22, 28

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1981) 29

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 19, 25

In the Matter of the Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991) 21, 23, 24

Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991) 27

Lewis v. City of New Orleans, 415 U.S. 130 (1974) 25, 28, 29

Miller v. California, 413 U.S. 15 (1973) 24

Osborne v. Ohio, 110 S.Ct. 1691 (1990) 21

Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973) 26

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 6

United States v. Salyer, 893 F.2d 113 (6th Cir. 1989) 15

United States v. Lee, 935 F.2d 952 (8th Cir. 1991) .. 16, 19

United States v. O'Brien, 391 U.S. 367 (1968) ... 3, 14, 18

Ward v. Illinois, 431 U.S. 767 (1977) 24

Watts v. United States, 394 U.S. 705 (1969) 3, 14, 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Anti-Defamation League of B'nai B'rith, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry* (1988 and Supp. 1990) 17

P. Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, 3 Crim. Just. 19 (1988) 12

Governor's Task Force on Bias-Related Violence, State of New York, Final Report (1988) 7

Hate Crime Statistics Act of 1988: Hearing on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 240 (June 21, 1988) 12

V. Lane, *Bias Motivated Crimes, A Summary Report of Minnesota's Response* (1990) 9

V. Lee, *Legislative Responses To Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 Harv. C.R.-C.L. L. Rev. 287 (1990) 7, 16

C. Lutz, *They Don't All Wear Sheets, A Chronology of Racist and Far Right Violence – 1980-1986* (1987) 8

M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) 11

National Institute Against Prejudice and Violence, *Striking Back at Bigotry: Remedies Under Federal and State Law For Violence Motivated By Racial Religious, And Ethnic Prejudice* (1986) 17

TABLE OF AUTHORITIES – Continued

Page

M. & J. Newton, *Racial & Religious Violence In America: A Chronology* (1991) 7

H. Shapiro, *White Violence and Black Response* (1988) 7

U.S. Commission on Civil Rights, *Intimidation and Violence, Racial and Religious Bigotry in America* (Clearinghouse Publication No. 96, 1990) 8, 9, 13

No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF OF THE STATES OF MINNESOTA, ALABAMA, ARIZONA, CONNECTICUT, IDAHO, ILLINOIS, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, VIRGINIA AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The amici curiae states, through their attorneys general, respectfully submit this brief in support of Respondent City of St. Paul. They support affirmance of the decision of the Minnesota Supreme Court narrowly construing the ordinance of the City of St. Paul at issue and holding it constitutional as construed.

This case involves the confluence of several significant, and sometimes competing, societal values: the fundamental principle that all citizens of this nation have an equal right to life, liberty, and the pursuit of happiness without regard to race, religion, national origin, sex or other invidiously discriminatory distinction; the equally basic premise that freedom of speech preserves and strengthens our democratic society; and the elementary tenet that preservation of peace and order are necessary to the maintenance of the social fabric. The amici states have both an interest in and responsibility to foster the accomplishment and protection of each of these values. Part of that interest and responsibility lies in seeking to reach the proper balance among these interests when they conflict. This brief is submitted with the hope that it will assist the Court in identifying that appropriate balance in this case.

SUMMARY OF ARGUMENT

As a nation we are dedicated to equality of opportunity for all and eradication of invidious discrimination. Our commitment to equal treatment is reflected in our constitutions and laws (federal and state), as well as in our judicial decisions. Nevertheless, bias-motivated violence, such as the cross-burning at issue here, remains a significant problem. Indeed, a substantial increase in the number of incidents of bias-motivated crime has been reported in recent years.

State and local governments have a strong interest in putting a stop to bias-motivated violence that transcends their general interest in maintaining peace and order. Bias-motivated violence has significantly more harmful impacts than similar criminal conduct not similarly motivated. The

effects on the victims can be particularly denigrating and threatening. Effects on the community can also be serious, ranging from alienation to increased tension to additional violence. The amplified harm caused by bias-motivated violence gives states compelling reasons to adopt measures directed at its elimination. Such measures are important as well for the message that they convey to both the victims and perpetrators of bias-motivated violence that such conduct is unacceptable in our society.

States have adopted a variety of measures to address the problem of bias-motivated violence. Some laws prohibit threatening speech. Others enhance penalties for criminal activity that is bias-motivated. Others criminalize conduct that interferes with the exercise of civil rights, while others penalize bias-motivated property damage and vandalism. No less that forty-three states have laws that specifically address some form of bias-motivated violence.

The states have not lost sight of the first amendment in enacting these laws. There is a range of bias-motivated conduct that is prohibited by the states without infringing any first amendment rights. None of the states' laws ban ideas; none prohibit a speech to a rally advocating bigotry. To the extent that the state laws reach pure speech, they tend to address only genuine threats, which are not protected under the first amendment. *Watts v. United States*, 394 U.S. 705 (1969). To the extent these laws reach conduct with some expressive element, they are subject to the standard of *United States v. O'Brien*, 391 U.S. 367 (1968), and satisfy its requirements. They are aimed not at any expressive content of the violent conduct, but at the harmful effects of that conduct. Bigots have ample alternative avenues for expression of their beliefs. They are only prohibited from expressing them in a

manner intended to do harm to person or property or to interfere with the enjoyment of civil rights.

The St. Paul ordinance challenged here should be reviewed as limited by the Minnesota Supreme Court. The state court construed the ordinance to apply only to two forms of expressive conduct, fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and intentional incitement of imminent lawless action, *Brandenberg v. Ohio*, 395 U.S. 444 (1969). Because these two categories have previously been held by this Court to be undeserving of first amendment protection, the ordinance cannot be substantially overbroad. Thus, petitioner can challenge the ordinance only as applied to his alleged conduct, burning a cross on the property of an African-American family. As applied to petitioner's alleged conduct, the ordinance is neither overbroad nor unconstitutionally vague.

ARGUMENT

I. STATES HAVE A COMPELLING INTEREST IN PROHIBITING BIAS-MOTIVATED ACTIVITY THAT IS DIRECTED AT AND HARMFUL TO INDIVIDUAL CITIZENS.

As the United States embarks on its third century, it should be beyond cavil that we are a nation committed to equality and tolerance. One of the bedrock principles of our democracy is that every individual should have an equal opportunity in our society regardless of race, religion, national original or sex. Indeed the quest for religious tolerance was part of the founding heritage of the country. Sadly, our commitment to racial equality came

later and at great cost to those who have suffered the legacy of slavery and *de jure* segregation. Nevertheless, our commitment to racial equality is no less fundamental or important for our more recent dedication to it.

This national commitment to elimination of invidious discrimination is not just empty ideals and rhetorical goals. Rather, it is firmly rooted in our constitutions and laws. The first amendment to the United States Constitution guarantees religious liberty. The thirteenth amendment requires the elimination of all badges of slavery. The fourteenth amendment guarantees to each citizen the equal protection of the laws. State constitutions echo these federal provisions. *E.g.*, Ariz. Const. §§ 12 (religious freedom) and 13 (equal protection).

Legislation evidences and enforces the commitment to equal opportunity and treatment. Federal law makes criminal conduct that attempts to deprive individuals of their rights based on race, 18 U.S.C. § 242 (1988), and creates civil remedies for discriminatory conduct. *E.g.*, 42 U.S.C. §§ 1981, 1982, and 1985(3) (1988). The right to equal opportunity and fair treatment in public accommodations, public education and employment, among other areas, is specifically protected by federal statute. 42 U.S.C. §§ 2000a *et seq.*, 2000c *et seq.*, 2000e *et seq.* (1988). This commitment and the legislative efforts to achieve and enforce it are mirrored at the state level. *E.g.*, Minn. Stat. ch. 363 (1990) (prohibiting discrimination based on race, religion, national origin, etc., in employment, housing, public accommodations); Cal. Penal Code §§ 422.6-422.9 (West 1988).

The decisions of this Court further confirm the commitment. In the area of education, the Court has repeatedly enunciated the nations's commitment to eradication of racial discrimination.

> [T]here can no longer be any doubt that racial discrimination in education violates deeply held and widely accepted views of elementary justice. . . . This Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), signalled an end to that era [of racial segregation]. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest to a firm national policy to prohibit racial segregation and discrimination in public education.

Bob Jones University v. United States, 461 U.S. 574, 592-93 (1983). Similarly, in addressing a challenge to the Minnesota Human Rights Act, the Court explained:

> [T]he Act reflects the State's historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. [Citation omitted.] That goal, which is unrelated to the suppression of expression, plainly serves a compelling state interest of the highest order.

Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

Much of the legislative approach to combatting discrimination has been directed at specific areas, such as education, housing, employment, and public accommodations. Since the issues that have reached this Court have usually been driven by the legislation, the Court's decisions have also been in the context of those areas.

However, in recent years, another facet of the ugly face of racism and discrimination has gripped the public attention: bias-motivated violence.[1] It would be naive to say that this problem is a recent one. *See* H. Shapiro, *White Violence and Black Response* (1988) (examining the history of racial violence from Reconstruction through the Civil Rights Movement of the 1960's); M. & J. Newton, *Racial & Religious Violence In America: A Chronology* (1991). Nevertheless, there has been an apparent resurgence of bias-motivated crime in recent years. In the last decade reports of bias-motivated violence have become commonplace. Although no hard statistics on a nation-wide basis are yet available,[2] there is strong

---

[1] The New York Governor's Task Force on Bias-Related Violence defined bias-motivated violence as:

> an act or a threatened or attempted act of intimidation, harassment or physical force directed against any person, or group, or their property or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of deterring the free exercise or enjoyment of any rights or privileges secured by the Constitution or the laws of the United States or the State of New York whether or not performed under color of law.

V. Lee, *Legislative Responses To Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 Harv. C.R.-C.L. L. Rev. 287, 288 n.5 (1990) (quoting Governor's Task Force on Bias-Related Violence, State of New York, Final Report 2 (1988)).

[2] On April 23, 1990, the federal Hate Crime Statistics Act became law. It requires the Justice Department to compile and report annually statistics on the national incidence of hate crimes. Hate Crime Statistics Act, Pub. L. 101-275, 104 Stat. 140 (1990).

evidence to support the widely-held view that bias-motivated violence is on the increase. For example, the United States Commission on Civil Rights has reported the increase in anti-Semitic incidents documented by the Anti-Defamation League ("ADL") of B'nai B'rith. U.S. Commission on Civil Rights, *Intimidation and Violence, Racial and Religious Bigotry in America* 4 (Clearinghouse Publication No. 96, 1990) (hereinafter "Intimidation and Violence").[3] Introducing a survey of bias-motivated violence from 1980-1986, the Center for Democratic Renewal noted:

> Not a day has passed in the last seven years without someone in the United States being victimized by hate violence. Harassment, vandalism, arson, assault and murder motivated by racism, anti-Semitism or other forms of bigotry – such as homophobia – plague every section of our country. This violence is a largely unrecognized cancer eating away our communities and social institutions.

C. Lutz, *They Don't All Wear Sheets, A Chronology of Racist and Far Right Violence – 1980-1986* 11 (1987).

This chilling reality has been reflected in studies at the state level as well.

> Like other states, Minnesota is experiencing increasing incidents of bias-motivated harassment and violence. Law enforcement statistics

---

[3] ADL records reported by the U.S. Commission showed an increase in anti-Semitic vandalism from 377 episodes in 1980 to 715 in 1984 and 838 in 1988. Anti-Semitic "harassments, threats, and assaults" increased from 112 in 1980 to 458 in 1988. *Intimidation and Violence* 4.

> and information collected by the Governor's Task Force on Prejudice and Violence document substantial levels of criminal behavior motivated by racial, sexual, religious and homophobic prejudice. Reports from college campuses across the state, from rural areas and small cities and from large metropolitan jurisdictions indicate that prejudice is widespread and has no geographic boundaries. Although victimized groups vary in relation to their representation in the local population, they universally experience a level of terror and frustration that it unique to victims who are randomly attacked for their values, beliefs and individual or group identities.

V. Lane, *Bias Motivated Crimes, A Summary Report of Minnesota's Response* 20 (1990). *See also Intimidation and Violence* 5-7.

Indeed, whether or not incidents of bias-motivated violence are on the increase, they are unarguably a significant problem. The U.S. Commission on Civil Rights concluded that "the phenomenon of racial and religious violence and harassment is a continuing threat to the maintenance of a peaceful, democratic and pluralistic society." *Intimidation and Violence* at 26. The states have a compelling interest in eliminating this particular threat posed by bias-motivated violence and harassment.

In the face of this virulent national epidemic, petitioner and at least one of their supporting amici posit an improperly narrow construct of the state interest at issue here. Petitioner urges:

> The references of the Minnesota Supreme Court to "protecting the community" against "bias-

> motivated threats," reflect the general governmental concern in maintaining public safety and order. . . . [G]eneral penal laws are available to punish any conduct and expression that is properly subject to regulation.

Petitioner's Br. at 12. The same argument is made by amicus curiae Patriot's Defense Foundation, Inc.:

> [T]here is absolutely no reason why a person who commits a crime for political or ideological reasons should receive a more severe criminal sanction for that reason than a person who commits a similar act on account of covetousness, greed, a desire for revenge, generalized malevolence or for some other base reason. . . . To the extent that racial and religious violence is a serious concern in our society, there is every reason to believe that our existing criminal laws and civil sanctions are more than adequate to deal with the problem.

Brief of Amicus Curiae Patriot's Defense Foundation, Inc. at 6-7.

The amici states vigorously disagree with this position. The burning of a cross on the property of an African-American family is most emphatically not the equivalent of a simple trespass and minor arson, either to the specific victims of the crime or to the community in which it occurs. Nor is the painting of a swastika on the wall of a synagogue the same kind of vandalism as painting meaningless graffiti on the wall.

From the point of view of the victim, bias-motivated crime can have devastating effects that differentiate it from similar conduct not motivated by prejudice. The victims of bias-motivated violence are harmed not just by

the damage to person or property that may result, but by the injury that results from its motivation. Plainly, such crime conveys to the victim that he or she is different, inferior, unwelcome and unwanted. Because bias-motivated crime indicates that the victim was an intentional, not random target, it also conveys the threat that more violence may be in store. *See* M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2336-38 (1989).

In addition, bias-motivated crime has potential impacts on the community that differ from those resulting from similar acts committed "on account of covetousness, greed, a desire for revenge, generalized malevolence or for some other base reason." As reported to Congress by the American Psychological Association:

> Bias-motivated crimes have long-lasting effects on the individual and the community of which they are a part. Such crimes are directed not only at the individual victim but to their communities as well.
>
> . . . .
>
> Research that has been conducted on the impact of crime and violence on the larger community tends to report that there is an increase in community tensions, a higher propensity for continued violence and that groups which are the focus of violence become distrustful, hostile, and withdrawn from the larger community. The effect of racial, ethnic, religious, and homophobic violence is one of limiting community participation and decreasing personal interaction.

Hate Crime Statistics Act of 1988: Hearing on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 240-41 (June 21, 1988) (testimony of the American Psychological Association). The American Bar Association Section on Criminal Justice recently reported:

> [M]any criminal justice personnel and community leaders believe that crimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice because they are intended to intimidate an entire group. The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of society.

P. Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, 3 Crim. Just. 19, 20 (1988).

These amplified harmful effects and consequences of bias-motivated violence provide states with compelling reasons to take measures specifically directed at such conduct.

Nevertheless, the increased harm of bias-motivated violence is not the only reason that it should be addressed as more than just common crime. There is a significant symbolic message involved. By directly and expressly attacking bias-motivated violence, society tells those who would engage in bias-motivated violence that their conduct is unacceptable and specifically contrary to public policy. There is significant value in transmitting

that message. The U.S. Civil Rights Commission concluded:

> Some national, State, and local leaders have not been as vocal as they should be in expressing outrage over criminal acts that deny constitutional rights to persons because of their color, creed, religion, or national origin. Whether this is due to unintentional insensitivity, or to a deliberate conspiracy of silence, it too becomes the ground for believing that illegal acts of racial or religious violence will not be challenged seriously.

Intimidation and Violence at 27. By treating bias-motivated crime as something different from other criminal conduct, states send the message urged by the Civil Rights Commission to both the victims and the perpetrators of such violence.

States should not be prohibited from doing so by mistaken claims of first amendment freedom. As demonstrated below, there is plainly a core of bias-motivated conduct that is deserving of no first amendment protection.

II. THERE IS A RANGE OF BIAS-MOTIVATED ACTIVITY THAT MAY BE PROHIBITED WITHOUT INFRINGING FIRST AMENDMENT RIGHTS.

Amici states hold the freedom of speech guaranteed by the first amendment in no less regard than they do their commitment to the goal of freedom from bias-motivated violence. While those goals may at some points on the spectrum be in tension, amici believe there is a clearly

identifiable range of conduct and speech that can permissibly be regulated without offending first amendment rights.

It is axiomatic that the first amendment freedom of speech is not absolute. Pure speech is afforded the strongest protection, but there are even forms of pure speech that are beyond the protective shield of the first amendment. *E.g., Watts v. United States*, 394 U.S. 705 (1969) (true threats). Speech mixed with conduct is entitled to some first amendment protection, but of a lesser degree. *E.g., United States v. O'Brien*, 391 U.S. 367 (1968). Finally, the state plainly can prohibit conduct that has no expressive content. Such conduct does not come under the protective umbrella of the first amendment merely because the conduct is motivated by particular beliefs, political, social or otherwise.

In their efforts to combat bias-motivated violence, states have adopted a variety of measures and approaches that address these various levels of activity.

Some states have criminalized bias-motivated speech when its purpose is to threaten or harass. *E.g.*, R.I. Gen Laws § 11-42-3 (Supp. 1990). Section 11-42-3, in pertinent part, provides:

> Whoever, verbally or by a written or printed communication, maliciously threatens any injury to the person, reputation or property of another, with the intent to terrorize that person by reason of their race, religion or national origin, shall be punished . . . .

Another approach has been to provide enhanced penalties for criminal activity that is motivated by bias. *E.g.*,

Ill. Ann. Stat. § 12-7.1 (Smith-Hurd Supp. 1991); Ohio Rev. Code Ann. § 2927.12 (Anderson 1987).[4] The Ohio law provides:

> (A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief] or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of race, color, religion, or national origin of another person or group of persons.
>
> (B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

Another approach adopted by some states has been enactment of laws that prohibit conduct that interferes, based on race, color, religion, sex, or national origin, with an individual's exercise or enjoyment of rights granted by state or federal law. *E.g.*, Cal. Penal Code §§ 422.6-422.9 (West 1988). Section 422.6 provides:

> (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other

---

[4] *Cf. United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989) (affirming upward adjustment of sentence based on race of victim and "particular susceptibility" to cross burning).

person's race, color, religion, ancestry, national origin, or sexual orientation.

(b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, because of the other person's race, color, religion, ancestry, national origin, or sexual orientation.

(c) Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in the county jail not to exceed six months, or by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment; provided, however, that no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

These laws are modeled in part on federal civil rights laws. V. Lee, *Legislative Responses To Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 Harv. C.R.C.L. L. Rev. 287, 292 (1990).[5]

---

[5] *See United States v. Lee*, 935 F.2d 952 (8th Cir. 1991). In *Lee*, the Eighth Circuit upheld against first amendment challenge a conviction under 18 U.S.C. § 241 (1988) for burning a cross on a hill near an apartment building in which an African-American family lived.

Other state laws address property-related aspects of bias-motivated violence by prohibiting vandalism to religious institutions. *E.g.*, Ga. Code Ann. § 16-7-26 (Michie 1988). Yet others are more narrowly directed at acts such as the cross-burning involved in this case. Some of these prohibit cross-burning with specific intent to threaten or harass, *e.g.*, Va. Code Ann. § 18.2-423 (1988); others target cross-burning on public property or the property of another without consent, *e.g.*, Fla. Stat. §§ 876.17-.18 (1989).

These examples of state laws directed at bias-motivated violence are by no means exhaustive.[6] At least forty-three states have enacted one or more of these approaches to combating bias-motivated violence.

In doing so, the states have not lost sight of the first amendment. Recognizing that these approaches cannot be analyzed abstractly in the aggregate, it is nevertheless useful to identify certain principles of first amendment jurisprudence that indicate that these state approaches to bias-motivated violence withstand scrutiny.

First, it must be noted that none of these statutes purport to restrict anyone's beliefs; bigots remain free to believe as they choose. Nor do the statutes interfere with protected free speech. No person is prohibited by these

---

[6] Several publications have documented these efforts more completely. *E.g.*, National Institute Against Prejudice and Violence, *Striking Back at Bigotry: Remedies Under Federal and State Law For Violence Motivated By Racial, Religious, And Ethnic Prejudice* (1986); Anti-Defamation League of B'nai B'rith, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry* (1988 and Supp. 1990).

laws from addressing a rally, advocating his or her belief in bigotry or hatred, no matter how unpopular or abhorrent to society as a whole.

To the extent that these statutes reach pure speech, they tend to have a narrow grasp. Laws that prohibit speech directed to specific individuals or groups of individuals and require intent to threaten or harass infringe no first amendment rights because the prohibited speech falls into the unprotected category of either threats, *Watts v. United States*, 394 U.S. 705 (1969), or fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

To the extent these laws regulate conduct that has some expressive content, they are subject to the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, a law will be upheld if:

> [1] it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77.

State laws prohibiting bias-motivated violence satisfy each of these elements. First, they are obviously within the constitutional power of the states as exercises of their traditional police powers to protect the health, safety and welfare of their citizens. *E.g., Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2462 (1991). Second, as described in

section I, *supra*, states have a substantial interest in eliminating bias-motivated violence.

Third, this interest is not related to the suppression of free expression. These laws are not directed at the expression of the idea of hatred or bigotry, but at the injury, or threat of injury, to person, property or the exercise of the victim's civil rights that results from the proscribed conduct. *See United States v. Lee*, 935 F.2d 952 (8th Cir. 1991) (upholding conviction under 18 U.S.C. § 241 for cross-burning on this basis). Moreover, since these laws generally require intent to interfere with civil rights or to threaten injury, any expressive element involved in the conduct is so subordinate that the regulation is permissible. *See Colten v. Kentucky*, 407 U.S. 104, 107, 111 (1972).[7] Thus, these laws are, in a sense, a time, place or manner restriction. The expression of bigotry is not prohibited except in the context of speech or conduct that intentionally and directly threatens, intimidates or injures an individual or group of individuals. Only expressed in this "manner" are ideas of bigotry and hatred regulated. Moreover, the specific focus on bias-motivated violence, which may include some aspect of expression, does not necessitate scrutiny as content-based regulation. Like

---

[7] *But see Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). In *Falwell*, the Court held the intent element of a tort claim for intentional infliction of emotional distress insufficient to overcome the first amendment protection for a parody of a public figure. *Id.* at 52-53. However, there is no reason why that ruling concerning "public debate about public figures" should control beyond that limited area.

specific zoning for "adult" theaters, this regulation is aimed not at permissible expression, but at the harmful secondary effects described in section I of this brief. *See City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41 (1986); *Barnes v. Glen Theatres, Inc.* 111 S. Ct. 2456, 2469 (1991) (Souter, J., concurring).

Finally, the fourth element of the *O'Brien* test is satisfied because the incidental restriction on first amendment activity is no greater than necessary to achieve the governmental interest. While it may be argued that general criminal laws could be used to prohibit the conduct at issue, for the reasons explained in section I, *supra*, reliance on general criminal laws does not fully address the interest at stake.

Thus, amici states believe there is a broad range of bias-motivated violence that can be, and is, properly regulated without interfering with protected first amendment rights. As demonstrated below, the St. Paul ordinance, limited by the Minnesota Supreme Court, is well within this range.

III. AS NARROWLY CONSTRUED BY THE MINNESOTA SUPREME COURT, THE SAINT PAUL ORDINANCE IS VALID.

Petitioner and its supporting amici have devoted much of their arguments to attacking the facial validity of the St. Paul ordinance as written. However, the Minnesota Supreme Court has construed the ordinance narrowly in order to preserve its constitutionality. A state court's interpretation of state law is considered binding by this Court, *see, e.g., Chaplinsky v. New Hampshire*, 315

U.S. 568, 572 (1942), and the Court's analysis of the validity of the ordinance should, therefore, be based on the ordinance as construed, not as written.

Petitioner seeks to challenge the ordinance as overbroad on its face, without reference to the particular conduct for which he was charged. It is well-established that a facial challenge on overbreadth will not be successful unless the overbreadth "is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' " *Osborne v. Ohio*, 110 S. Ct. 1691, 1697 (1990) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Given the limiting interpretation by the state court, the ordinance does not reach a significant amount of protected first amendment speech and is plainly not "substantially" overbroad. It cannot, therefore, be challenged by petitioner based on its application to conduct other than his own.

The state court interpreted the ordinance to apply to two limited categories of bias-motivated expressive conduct. First, the court limited the reach of the ordinance to "expressive conduct that amounts to 'fighting words' – conduct that itself inflicts injury or tends to incite immediate violence . . . . " *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Second, the court held that the ordinance also prohibits "conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " *R.A.V.*, 464 N.W.2d at 510 (citing *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969)). Thus, the ordinance reaches only conduct that is likely to result in immediate breach of the

peace, in the first instance because the target of the conduct will react violently or, in the second, because the actor intentionally incites his supporters to imminent lawless action.

To the extent the ordinance reaches expressive conduct, it has been explicitly limited by the state court to these two types of conduct. This Court has identified both as not receiving first amendment protection. As so interpreted, the ordinance can hardly be said to reach a substantial amount of protected conduct.

Attempting to escape this conclusion, petitioner and his supporting amici argue that the ordinance was not properly susceptible to this narrowing construction. Their arguments should be rejected. This is not a case in which the state courts have applied the challenged law numerous times without limiting its scope. *Compare Gooding v. Wilson*, 405 U.S. 518, 524-27 (1972). Nor is it a case where the law was stated in such all-encompassing terms that no limiting construction could reasonably be discerned. *Compare Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) ("The resolution expressly applies to all 'First Amendment activities,' and the words of the resolution simply leave no room for a narrowing construction."). Nor is this a case in which a reasonable limiting construction is precluded by other state law. *Compare City of Houston v. Hill*, 482 U.S. 451, 462 n.10 (1987) (fighting words limitation not available because such a construction preempted by state law). Rather, it is a case in which the state supreme court has, in its first opportunity to review the ordinance, narrowed its reach to specific types of expressive conduct this Court has previously identified as not entitled to first amendment

protection. There is no basis on which this Court should ignore the state court's authoritative interpretation of the ordinance.

Amici and petitioner also make strained arguments that attempt to portray the ordinance as affecting a significant range of protected conduct despite the state court's narrowing construction. These efforts are flawed and should be rejected.

It is argued that the court's holding that the ordinance can reach conduct that incites imminent lawless action fatally ignores the context of the *Brandenberg* decision. Br. of Amici Curiae Association of American Publishers and Freedom to Read Foundation ("AAP Br.") at 15-19. The amici argue that *Brandenberg* only applies to speech that *advocates* lawless action and actually incites imminent lawless action by those to whom the advocacy is addressed. They argue that the lower court here construed the law to prohibit speech that incites imminent lawless action among those who are the targets of the speech, even if the speaker did not urge such lawless action. Thus, amici contend, a speaker could be punished because of the unlawful reaction of a hostile audience.

Contrary to amici's distorted version of the decision below, the state court plainly construed the ordinance to apply only to the kind of speech identified as unprotected in *Brandenberg*. The Minnesota court held that the law prohibits "conduct that is *'directed to* inciting or producing imminent lawless action . . . .' " *R.A.V.*, 464 N.W.2d at 510. Using the very words from *Brandenberg*, the court obviously identified precisely the kind of speech urging

lawless action that this Court held is unprotected. The court also wrote that:

> Because the City's disorderly conduct ordinance is reasonably subject to an interpretation limiting its scope to *such conduct as Brandenberg places outside first amendment protection,* we conclude that it is not substantially overbroad.

Id. (footnote omitted). The state court thus made it unequivocally clear that it was referring to precisely the kind of conduct this Court described in *Brandenberg,* nothing more, nothing different. Amici's strained attempt to obfuscate the meaning intended by the state court should be rejected.

The same amici also contend that the court below failed to sufficiently narrow the ordinance to unprotected fighting words. First, they argue that the ordinance as construed reaches more than the fighting words defined in *Chaplinsky,* because the decision does not specify that the immediate breach of the peace that is threatened must come from the addressee of the speech, rather than a bystander. AAP Br. at 20-21. The Minnesota Supreme Court made exceedingly clear its intention to incorporate and graft onto the ordinance this Court's definition of unprotected "fighting words," which includes the gloss amici contend is fatally absent. *Cf. Ward v. Illinois,* 431 U.S. 767, 774-76 (1977) (overbreadth challenge to obscenity statute rejected where state court decision incorporated necessary limitations from *Miller v. California,* 413 U.S. 15 (1973)). In limiting the reach of the St. Paul ordinance to fighting words, the state court should not be required to parrot the entire *Chaplinsky* decision and all the subsequent references to it by this Court.

Amici also argue that the Court below erred by including within its description of fighting words conduct "that itself inflicts injury" as well as that which "tends to incite immediate violence." AAP Br. at 22-23. They argue that the "inflicts injury" aspect of fighting words has been abandoned by this Court, even though it has frequently been included in the Court's references to the doctrine. *E.g., Hustler Magazine v. Falwell,* 485 U.S. 46, 56 (1988); *City of Houston v. Hill,* 482 U.S. 451, 461 (1987); *Lewis v. City of New Orleans,* 415 U.S. 130, 132 (1974). Given this Court's frequent and recent recitation of the same language used by the state court here to describe fighting words, it cannot be argued persuasively that the state court has overstepped constitutional bounds.

The phrase "[words] that by their very utterance inflict injury" does not connote offensive language of the type that merely offends the sensibilities of some, *see Cohen v. California,* 403 U.S. 15 (1971), or that might be labelled as outrageous as applied to a public figure, *see Hustler Magazine v. Falwell,* 485 U.S. 46 (1988). Rather it connotes words that inflict true and substantial injury, such as the kind of racial slurs that, in the particular context, by their utterance strike fear in the victim and convey a threat of violence. Limited, as this branch of fighting words is, to words spoken directly to an individual target and to those words that truly are injurious rather than merely offensive, speech with genuine first amendment value is not threatened.[8]

---

[8] Moreover, even if this branch of the fighting words definition were to encompass some range of speech the Court now wishes to exclude from the state's permissible reach, it would not be sufficient to render the ordinance as construed *substantially* overbroad in comparison to the law's permissible applications.

Amicus Center for Individual Rights ("CIR") argues that the state court's narrowing construction fails to save the ordinance because the definition of fighting words is underinclusive. Brief of Center for Individual Rights at 10-12, 18-19. CIR argues that even if fighting words can be prohibited, it is impermissible to single out fighting words that create the risk of violent reaction based on race, color, religion, etc.

The cases of this Court relied on by amicus do not support this proposition. Each of the cases proffered involved a law that restricted some form of *protected* conduct, but did not similarly restrict others. *Cox v. Louisiana*, 379 U.S. 559 (1965) (only union picketing allowed on the streets); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973) (regulation of campus publications); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax exemption limited to religious, professional, trade and sports magazines). As the Court explained in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975), another case cited by amicus, "the Constitution does not permit government to decide which types of otherwise *protected* speech are sufficiently offensive to require protection for the unwilling listener or viewer." (Emphasis added.)

Those cases say nothing about the capacity of the state to specifically proscribe certain types of *unprotected* expressive conduct while leaving others to general prohibitions. Here, as amicus CIR pointed out, the state has a statute that prohibits fighting words generally. CIR Br. at 18, citing Minn. Stat. § 609.72, subd. 1(3) (1990). Because of their singular and distinct harms to victims and the

community, the City of St. Paul chose to separately proscribe bias-motivated fighting words. There is no first amendment principle undermined by that prohibition of unprotected conduct.

Amicus relied as well on Judge Posner's hypothetical example in *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991). Judge Posner hypothesized:

> It is easy to imagine a statute that would not exert the state's full power over obscenity yet would violate the First Amendment. A statute forbidding the sale of obscene books unless the book confined its depictions to procreative sex would be one. The state is permitted to suppress obscenity but it is not permitted to distort the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message.

Id. at 517 (*dictum*). The analogy fails here because there is no legitimate "marketplace" of fighting words. As the Court wrote in *Chaplinsky:* "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, 315 U.S. at 572.

Finally, other amici contend that the state court's limiting construction is to no avail because the ordinance remains overboard. Brief Amicus Curiae of the American Civil Liberties Union, Minnesota Civil Liberties Union, and American Jewish Congress at 14-16. They argue that the Minnesota court's invocation of the fighting words

doctrine is insufficient to eliminate the overbreadth, relying on *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). In *Lewis*, on remand for reconsideration in light of *Gooding v. Wilson*, 405 U.S. 518 (1972), the Louisiana Supreme Court ruled that the ordinance at issue was to be limited to "fighting words." However, this Court concluded that despite invoking the "fighting words" doctrine, "[t]he Louisiana Supreme Court on remand did not refine or narrow [the] words [of the ordinance], but took them as they stood . . . . " *Lewis*, 415 U.S. at 132. As Justice Powell explained further:

> In conclusory language, that court construed the ordinance to create a *per se* rule. Whenever "obscene or opprobrious language" is used "toward or with reference to any member of the city police while in the actual performance of his duty," such language constitutes "fighting words" and hence a violation without regard to the facts and circumstances of a particular case. As so construed, the ordinance is facially overbroad.

Id. at 134-35 (Powell, J., concurring).

Amici argue that the Minnesota court created a similarly fatal per se rule by stating that a burning cross is "an unmistakable symbol of violence and hatred." This strained interpretation of the decision below should not form the basis for this Court's opinion. No fair reading of the decision below can lead to amici's conclusion that *every* cross burning is a violation of the ordinance as

construed, regardless of the circumstances of the particular case.[9] Rather, conduct must be judged in accordance with the standards enunciated, and if it is likely to provoke an immediate breach of the peace, it is prohibited. Since the lower court decision did not create a per se rule inconsistent with this Court's definition of fighting words, as the Louisiana court did in *Lewis*, amici's argument fails.

The Minnesota Supreme Court limited the reach of the St. Paul ordinance to two categories of potentially expressive conduct that enjoy no first amendment protection. Because the ordinance as construed does not reach a substantial amount of protected expression, petitioner cannot challenge it based on conduct other than his own. As applied to petitioner's alleged conduct, burning a cross on the property of an African-American family, there can be no doubt that the ordinance suffers no first amendment infirmity. Petitioner's alleged conduct was simply beyond any first amendment protection.

Petitioner also attempts to challenge the ordinance on its face as unconstitutionally vague. However, because the ordinance as construed does not reach protected first amendment expression, it can only be invalidated "if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495

---

[9] The phrase relied on by amici certainly creates no per se rule, occurring as it does at the beginning of the decision, and not in the court's discussion of its limiting construction.

(1981). Petitioner's alleged conduct of burning a cross on the property of an African-American family could not reasonably be thought to be beyond the reach of the ordinance. Accordingly, petitioner's vagueness challenge should be summarily rejected.

CONCLUSION

The decision of the Minnesota Supreme Court upholding the St. Paul ordinance as narrowly construed should be affirmed.

Dated: August, 1991

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

525 Park Street, Suite 200
St. Paul, MN 55103
(612) 296-6473

Counsel for Amicus Curiae
State of Minnesota

(Additional Counsel Listed On Inside Cover)

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

R. A. V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING AFFIRMANCE

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Should the overbreadth doctrine be invoked to prevent prosecution of a person whose conduct is both clearly proscribed by the ordinance and clearly within the power of the state to proscribe, when (1) the conduct before the Court lies in an area cleanly severable from the possibly unconstitutional applications, and (2) the state court's construction of the ordinance makes the constitutionality of those other applications a close question.

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of amicus curiae 1

Summary of facts and case 2

Summary of argument 3

Argument 3

I

The overbreadth doctrine is itself overbroad and should be used sparingly, if at all 4

A. The legitimate scope of judicial review 5

B. Concrete facts and wise decisions 8

C. Collateral damage 8

II

The overbreadth doctrine should not be invoked in this case . 9

A. Partial invalidation v. narrowing construction 9

B. The *Marbury* principle 10

C. Severable, nonseverable, and amorphous statutes . .11

D. Severance by location 12

1. Consensual placements 12

2. Trespassory placements 13

3. Public property 15

E. Overbreadth and the present case 15

Conclusion 17

TABLE OF AUTHORITIES

Cases

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U. S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968) 13

Bayard v. Singleton, 1 N. C. 15 (1787) 5

Barclay v. Florida, 463 U. S. 939, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983) 14

Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U. S. 569, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987) . . .11

Brandenburg v. Ohio, 395 U. S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969) 2

Broadrick v. Oklahoma, 413 U. S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973) 5, 6

Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985) . .7, 9, 10, 11, 12, 16

Chaplinsky v. New Hampshire, 315 U. S. 568, 86 L.Ed. 1031, 62 S. Ct. 766 (1942) 2, 13

Ex parte Peru, 318 U. S. 578, 87 L. Ed. 1014, 63 S. Ct. 793 (1943) 10

Houston v. Hill,, 482 U. S. 451 96 L. Ed. 2d 398, 107 S. Ct. 2502 (1987) 8

Hudgens v. NLRB, 424 U. S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976) 13

Lewis v. City of New Orleans, 415 U. S. 130, 39 L. Ed. 2d 214, 94 S. Ct. 970 (1975) 3, 5, 7, 8, 16

Liverpool, New York & Philadelpia S. S. Co. v. Commissioners of Emigration, 113 U. S. 33, 28 L.Ed. 899, 5 S. Ct. 352 (1885) 4, 9

Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. Ed. 60 (1803) 6, 10, 11

Matter of Welfare of R.A.V., 464 N. W. 2d 507 (Minn. 1991) 2

NAACP v. Button, 371 U. S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963) 7

New York v. Ferber, 458 U. S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) 5, 8, 10, 13, 16

Northern Va. Chap., ACLU v. Alexandria, 747 F. Supp. 324 (E. D. Va. 1990) 7

Osborne v. Ohio, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990) 9, 11

Parker v. Levy, 417 U. S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974) 8, 15

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U. S. 376, 37 L. Ed. 2d 669, 93 S. Ct. 2553 (1973) 13

PruneYard Shopping Center v. Robins, 447 U. S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980) 13

R.A.V. v. St. Paul, 115 L. Ed. 2d 969, 111 S. Ct. 2795 (1991). . 2

Sable Communications v. FCC, 492 U. S. 115, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989) 11

Schaumburg v. Citizens for a Better Environment, 444 U. S. 620, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980) 4

Secretary of State of Md. v. J.H. Munson Co., 467 U. S. 947, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984) 5, 7, 15

Shelton v. Tucker, 364 U. S. 479, 5 L. Ed. 2d 231,
81 S. Ct. 247 (1960) 9

State v. Chaplinsky, 18 A. 2d 754 (1941) 13

Texas v. Johnson, 491 U. S. 397, 105 L. Ed. 2d 342,
109 S. Ct. 2533 (1989) 16

United States v. Eichman, 110 L. Ed. 2d 287,
110 S. Ct. 2404 (1990) 5

United States v. Raines, 362 U. S. 17, 4 L. Ed. 2d 524,
80 S. Ct. 519 (1960) 11

Young v. New York City Transit Auth., 903 F. 2d 146
(CA2 1990) 7

United States Constitution

U.S. Const. art. IV § 4 9

U.S. Const. art. VI § 2 5

United States Statutes

Judiciary Act of 1789 § 13, 1 Stat. 58 10

State Statutes

Cal. Pen. Code § 190.2(a)(16) 14

Minn. Stat. § 609.2231, subd. 3 14

Minn. Stat. § 609.224 subd. 1 14

St. Paul, Minn. Leg. Code § 292.02 (1990) 2, 12

Miscellaneous

Declaration of Independence, para. 2 (1776) 9

Jordan and Wheeler, "14 Hurt as Anti-Klan Protesters
Clash with Police," Washington Post, Oct. 29, 1990,
at A1, col. 2 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

R. A. V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING AFFIRMANCE

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a claim that even though the government can and has prohibited petitioner's act, prosecution must be precluded in order to effectuate a policy unrelated to the justice of the case before the court. Such misuse of

---

1. Both parties have consented in writing to the filing of this brief.

the criminal justice system is contrary to the rights of victims and society which CJLF was formed to advance. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

R.A.V. allegedly participated in burning a cross on the yard of a Black family's home in St. Paul, Minnesota. *Matter of Welfare of R.A.V.*, 464 N. W. 2d 507, 508 (Minn. 1991). He was charged with violating St. Paul, Minn. Leg. Code § 292.02 (1990):

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The trial court dismissed the charge "on the ground that the ordinance censors expressive conduct in violation of the first amendment to the United States Constitution." 464 N. W. 2d, at 508. The Minnesota Supreme Court construed the ordinance to limit its prohibition "fighting words," *id.*, at 510 (citing *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)) and to "conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " 464 N. W. 2d, at 510 (quoting *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969)).

As so construed, the state court unanimously held that the ordinance was constitutional. *Id.*, at 511. This Court granted certiorari. *R.A.V.* v. *St. Paul*, 115 L. Ed. 2d 969, 111 S. Ct. 2795 (1991).

SUMMARY OF ARGUMENT

The overbreadth doctrine should be used sparingly, if at all. It is a doctrine of doubtful legitimacy, violating cardinal rules against unnecessary and overly broad constitutional decisions. Furthermore, pronouncement of rules in the absence of concrete factual disputes is unwise and error-prone. The doctrine may actually damage the First Amendment freedoms it is supposed to advance.

In addition to the state court's narrowing construction, federal courts can and should apply partial invalidation. This case involves conduct within a "core of easily identifiable and constitutionally proscribable conduct." Other conduct proscribed by the statute should be left to a case actually presenting the question. Alternatively, the ordinance should be invalidated only to the extent that it applies to placements of symbols on public forum property or on private property with the consent of the owner.

Under either approach, the ordinance should be affirmed to the extent that it prohibits placement of a burning cross on private property without consent of the owner.

ARGUMENT

R.A.V. committed the act.[2] The city *may* constitutionally punish this act. The city *has* passed an ordinance clearly prohibiting and punishing this act. Yet R.A.V. nonetheless claims that the Constitution of the United States prohibits the enforcement of that ordinance in this case.

Such a result would surely strike Jane and John Q. Public as odd, bordering on insane. The logic of the overbreadth doctrine often leads to extremes. See *Lewis* v. *City of New Or-*

---

2. More precisely, the allegations are assumed true in the procedural posture of the case.

leans, 415 U. S. 130, 136 (1974) (Blackmun, J., dissenting). When that happens, it is time to reexamine the premises. Common sense is more often right.

I. The overbreadth doctrine is itself overbroad and should be used sparingly, if at all.

The essence of an overbreadth challenge is that even though the party before the court has committed an act which the legislature can and has prohibited, he should nonetheless escape punishment because the same statute may, in other contexts, chill the exercise of First Amendment rights. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980). By its very nature, such an argument requires the court to deal with hypothetical situations "and pass upon . . . constitutionality . . . as an abstract question." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). Such a course is unwise and possibly illegitimate.

> "That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Ibid.*

Liverpool's statement that the Court has "rigidly adhered" to these rules is no longer true. The overbreadth doctrine routinely involves both advance rulings on constitutionality and the formulation of rules broader than necessary for decision.

These deviations have not gone unnoticed by the Members of the Court. Individual opinions have questioned both the legitimacy and the wisdom of the overbreadth doctrine. See *Lewis* v. *City of New Orleans*, 415 U. S. 130, 136-142 (1974) (Blackmun, J., dissenting); *New York* v. *Ferber*, 458 U. S. 747, 777-781 (1982) (Stevens, J., concurring in the judgment); *Secretary of State of Md.* v. *J.H. Munson Co.*, 467 U. S. 947, 976-978 (1984) (Rehnquist, J., dissenting). Majority opinions have also expressed reservations. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610-611 (1973).

These reservations are well-founded. If the overbreadth doctrine is not to be abandoned altogether, it should at the very least be kept on a tight leash.

A. The Legitimate Scope of Judicial Review.

Although people speak freely of courts "striking down" statutes, nowhere in the Constitution is such a function assigned to the judicial branch. Instead, the Constitution establishes a hierarchy of laws, and the judiciary must necessarily apply the higher law in preference to the lower one when the laws conflict. That preference is explicit in the case of state statutes, U. S. Const., art. VI, § 2, and implicit in the case of federal statutes.

The legitimacy of judicial review is well established in cases where the constitution and the statute actually command different results in the case before the court. See, *e.g.*, *Bayard* v. *Singleton*, 1 N. C. 15, 18 (1787) (jury trial); *United States* v. *Eichman*, 110 L. Ed. 2d 287, 292, 110 S. Ct. 2404 (1990) (flag burning). In these situations the court must decide whether the statute conflicts with the constitution because and *only* because there is no other way to decide the case.

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

> "So if a law be in opposition to the constitution; *if both the law and the constitution apply to a particular case*, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> "If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern *the case to which they both apply*." *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803) (emphasis added).

Legitimate judicial review is limited to the necessity of deciding cases, as outlined in *Marbury*. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611 (1973). That necessity is limited to cases to which "both the law and the constitution apply." If the Constitution does not apply to a case, then the case is governed solely by the statute, and there is no constitutional issue to decide.

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Citations.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [Citation.] These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system *courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws*." *Id.*, at 610-611 (emphasis added).

This is not a matter of policy; this is a matter of the boundaries of the judicial function. It is a matter of usurpation of

"the prerogative of democratic government." *Lewis*, *supra*, 415 U. S., at 140 (Blackmun, J., dissenting).

The overbreadth doctrine is sometimes justified by "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). But does the end justify the means?

Surely no one would contend that a court could reach out and "strike down" a statute on its own initiative, with no case before it at all. The patent illegitimacy of such a decree requires that the statute be tolerated until *someone* brings a challenge. Why can it not be further tolerated until a challenge is brought in a case where the constitutional right in question is *genuinely* at issue?

With modern procedures, there is no need to await a criminal prosecution. See *Munson*, *supra*, 467 U. S., at 977-978 (Rehnquist, J., dissenting). While the cost of declaratory relief is a concern, there appears to be a more than adequate supply of litigation. The panhandlers of New York's subway obtained representation. See *Young* v. *New York City Transit Auth.*, 903 F. 2d 146, 147 (CA2 1990), cert. denied 112 L. Ed. 2d 528, 111 S. Ct. 516 (1991). So did the people in Alexandria, Virginia, who felt threatened by an ordinance proscribing loitering for the purpose of engaging in unlawful drug transactions. See *Northern Va. Chap., ACLU* v. *Alexandria*, 747 F. Supp. 324 (E. D. Va.1990). When the State of Washington passed a "moral nuisance" statute, a complaint was on file within days. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 507 (1985) (O'Connor, J., concurring).

The notion that the First Amendment is suffering from a dearth of litigants seems out of touch with reality. Even if necessity could ever justify an otherwise improper constitutional edict, which is doubtful, a stronger showing of necessity would seem to be needed.

B. Concrete Facts and Wise Decisions.

Even if a court *may* decide cases on hypothetical facts, there remains grave doubt whether it *should*. One of the principal advantages of judicially developed law is that it arises from decisions on concrete facts in cases affecting real people. The justice or injustice of the result therefore influences the development of the rule. This advantage is lost when "the facts are relegated to footnote status, conveniently distant and in less disturbing focus." *Lewis*, *supra*, 415 U. S., at 137 (Blackmun, J., dissenting).

The quality of judicial decision-making is impaired when the decisions are made in a vacuum. Decisions rendered "in concrete factual situations . . . tend to be crafted with greater wisdom." *New York* v. *Ferber*, 458 U. S. 747, 781 (1982) (Stevens, J., concurring in the judgment). Hypothetical rulings, on the other hand, are "inherently treacherous," error-prone, and "qualitatively less reliable." *Id.*, at 781.

C. Collateral Damage.

The invalidation of an entire statute legalizes conduct that the people, through the democratic process, have deemed it necessary to prohibit. It may be true that "if some constitutionally unprotected speech [or conduct] must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *Houston* v. *Hill*, 482 U. S. 451, 462, n. 11 (1987). Whether the price is *worth* paying, however, begs the question of whether the price *needs* to be paid.

This Court has been reluctant to apply the overbreadth doctrine where the statute has a substantial number of valid applications. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974). Furthermore, the overbreadth doctrine must be carefully tied to the circumstances warranting its exception to the usual rules of constitutional adjudication. *New York* v. *Ferber*, 458 U. S. 747, 769 (1982). Overbreadth is a "last resort." *Ibid.*

When the legislative branch regulates in the area of fundamental rights, the judiciary admonishes that the least drastic

means must be employed. See, *e.g.*, *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). The judiciary should heed the same advice. The right of self-government is a fundamental right. See U. S. Const., art. IV, § 4; Declaration of Independence, para. 2 (1776). The overbreadth doctrine should be invoked, if at all, only when no less drastic interference with democratic government is available. That is rarely the case.

The overbreadth doctrine is itself overbroad.

II. The overbreadth doctrine should not be invoked in this case.

A. Partial Invalidation v. Narrowing Construction.

A statute need not be invalidated in its entirety because its literal wording is overbroad. Two separate but related alternatives are available. First, the court with the final authority to construe the statute may give it a narrower meaning than the literal wording would indicate. See *Osborne* v. *Ohio*, 109 L. Ed. 2d 98, 111-112, 110 S. Ct. 1691, 1698 (1990). Second, the court which must decide the validity may, in many cases, decide that the statute is only partially invalid. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985).

These two alternatives implement the twin principles set forth in *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885): "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[3] Narrowing construction avoids the need for a constitutional decision; partial rather than full invalidation avoids excessive breadth of the constitutional rule.

---

3. These are "cardinal rules governing the federal courts." *Brockett*, 472 U. S., at 501.

When a state statute is involved, the responsibility for the decision is divided. The construction of the statute is ultimately the responsibility of the highest state court, and that court's construction is binding on the federal courts. *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982). The necessity of invalidation for overbreadth, however, is a federal question. *Id.*, at 767.

In the present case, the Minnesota Supreme Court has both authoritatively construed the ordinance and concluded that the construction satisfies the First Amendment. R.A.V. urges this Court to disagree with the latter ruling. Even if he wins this point, however, he is not home free. *Brockett* clearly requires that a federal court entertaining an overbreadth challenge consider the less drastic measure of partial invalidation. 472 U. S., at 507.

B. The Marbury Principle.

Partial, rather than full, invalidation is not only the norm today, see *Brockett*, *supra*, 472 U. S., at 502, it has been the norm from the very beginning. The issue in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137 (1803) centered on the mandamus clause of section 13 of the Judiciary Act of 1789. 1 Stat. 58; see 1 Cranch, at 148, 173. In *Marbury*, as every lawyer knows, Chief Justice Marshall determined that clause to be inconsistent with the Constitution in the case presented, 1 Cranch, at 176, and then pronounced "that an act of the legislature, repugnant to the constitution, is void." *Id.*, at 177.

Yet the entire Judiciary Act was not void. Section 13 was not void. Not even the mandamus clause was void. The Supreme Court retained the power to issue writs of mandamus in aid of its appellate jurisdiction. *Ex parte Peru*, 318 U. S. 578, 582-583 (1943). The statute declared "void" in *Marbury* continued in force to the extent that it did not conflict with the Constitution.

This conclusion follows from the underlying rationale of *Marbury*. See *ante* pp. 5-6. Judicial review is only proper when both the Constitution and the statute apply to the case.

1 Cranch, at 178. In a case where only the statute applies and the Constitution is silent, the statute remains in force. Cf. *Osborne*, *supra*, 109 L. Ed. 2d, at 117, 110 S. Ct., at 1703 (rejecting contention that overbroad statute is a nullity).

The general rule, therefore, is "that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett*, *supra*, 472 U. S., at 502. *Brockett* flatly rejected the contention that First Amendment cases are exempt from this rule. *Ibid.*

C. Severable, Nonseverable, and Amorphous Statutes.

There are some statutes which, by their nature, do not lend themselves to partial invalidation. There may be cases where the legislature would not have wanted "its legislation to stand at all unless it could validly stand in its every application." *United States* v. *Raines*, 362 U. S. 17, 23 (1960). Such cases are rare. *Ibid.*; see also *Brockett*, *supra*, 472 U. S., at 506-507. In the present case, R.A.V.'s conduct is at the very core of the evil to which the ordinance is addressed.

A second type of statute is the one which is so amorphous that no lines of severability are discernable. The regulation in *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus*, 482 U. S. 569 (1987) is the ultimate example. The governing board of Los Angeles International Airport sought to ban all "First Amendment activities in the airport." *Id.*, at 570-571. The Court's discussion of the implausibility of a narrowing construction, *id.*, at 576, applies equally to the implausibility of a partial invalidation. There is no good place to draw a line.

Mechanical severability is conducive to partial invalidation,[4] but it is not required, as *Marbury* has illustrated from the

---

4. In *Sable Communications* v. *FCC*, 492 U. S. 115, 124, n. 6 (1989), *Sable* originally claimed "indecent" was not severable from "obscene," but dropped that claim when Congress split the two grounds of prohibition into separate subsections.

beginning.[5] *Brockett* makes clear that even in the First Amendment context, a statute can be invalidated as to some applications and left standing as to others without carving specific words out of the statute. Focusing on the single word "lust" in a moral nuisance statute, *Brockett* held that "[u]nless there are countervailing considerations, the Washington law should have been invalidated only insofar as the word 'lust' is to be understood as reaching protected materials." 472 U. S., at 504. The Court rejected a lower court holding that separation of valid and invalid applications of this single word was not feasible. *Ibid.*

D. Severance by Location.

The wording of the legislation is always a good starting point. "Whoever places *on public or private property* a symbol, . . . , including, but not limited to, *a burning cross* . . . shall be guilty of a misdemeanor." St. Paul, Minn. Leg. Code § 292.02 (emphasis added).

When examining the range of application of this ordinance, one obvious place to look is the location of the placement.[6] The First Amendment implications of prohibiting the placement of symbols are quite different for different locations.

1. Consensual placements.

First, there is placement of a symbol on one's own property or on another's property with the consent of the owner.[7] It is difficult to see any constitutional applications of the statute in this area. Beyond question, the Nazis can paint a swastika on their own headquarters, however offensive civilized people

5. See *ante* at 10.

6. Indeed, petitioner begins his analysis with location. Pet. Brief, part I B 1.

7. For brevity, amicus uses "owner" to mean the person presently entitled to possession, who may be a tenant.

may find it. Similarly, the Ku Klux Klan can burn a cross at its own rally on its own or its members' property, subject only to content-neutral fire regulations.

As construed by the Minnesota Supreme Court, however, the ordinance may not apply to such placements. "Fighting words," by definition, are words "likely to cause an *average* addressee to fight." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573 (1942) (quoting *State* v. *Chaplinsky*, 18 A. 2d 754, 762 (1941)) (emphasis added); see also *id.*, at 574 ("provoke the average person to retaliation"). It is difficult to imagine any consensual placements of symbols on private property which qualify. If such a category exists and if it is deemed protected speech despite *Chaplinsky*, there is no difficulty in partially invalidating the ordinance as to consensual placements on private property.

2. Trespassory placements.

At the other end of the spectrum are trespassory placements on private property, *i.e.* without consent of the owner. This category, considered separately, raises no First Amendment concerns. There is no First Amendment right to trespass on genuinely private property. See *Hudgens* v. *NLRB*, 424 U. S. 507, 520-521 (1976.)[8]

The argument that the classification in this ordinance is content-based is meritless. Once the conduct or speech falls outside the protection of the First Amendment, it is properly subject to content-based regulation. *New York* v. *Ferber*, 458 U. S. 747, 765-766, n. 18 (1982) ("kiddie porn"); see also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413

8. There is a very narrow exception for property which is effectively public and thus properly considered in the next category. See *id.*, at 516-517 (quoting *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308, 330-332 (1968) (Black, J., dissenting)). Also, a state may adopt a broader definition of this exception. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980).

U. S. 376 (1973) ("male help wanted").

Murder can be a form of expressive conduct. If a person commits murder for the purpose of publicizing his message of racial hatred, a state can constitutionally consider that purpose in assessing the punishment. *Barclay* v. *Florida*, 463 U. S. 939, 949-951 (1983) (plurality); *id.*, at 970-971 (Stevens, J., concurring in the judgment);[9] see also Cal. Pen. Code § 190.2(a)(16).

Once the act is properly defined as criminal, society may take the content into account in determining the degree of harm done and classifying the crime accordingly. The physical damage may be the same as if R.A.V. had built a campfire and toasted marshmallows, but the psychological harm to the victims is far greater.

Society as a whole also suffers a different kind of harm from a "hate crime," beyond the harm inflicted by an ordinary assault or trespass. Crimes such as this one inflame racial tensions and impede the integration of housing and schools. Indeed, the latter effect is very often the motive of the crime.

It is no defense to rape that the act could be punished as assault and battery. It is no defense to robbery that the act could be punished as grand theft. The psychological harm in each case makes the crime qualitatively different, and society is entitled to classify the crime differently. So, in this case, the question of whether R.A.V.'s act is also assault[10] or a criminal trespass is no constitutional impediment to the enforcement of this ordinance.

---

9. Barclay's counsel did not have the effrontery to raise a First Amendment claim. Amicus cites the case as a factual example rather than a precedent.

10. R.A.V. is also charged with bias-motivated assault under Minn. Stat. § 609.2231, subd. 3. See Pet. Cert. 3. The intent to cause fear of *immediate* bodily harm, see Minn. Stat. § 609.224 subd. 1 (defining assault), may not be present in this case. Cross-burning is generally a threat of future bodily harm.

In short, a clean, clear line of division separates this category of conduct from other conduct arguably covered by the ordinance, and the ordinance is clearly constitutional as applied to this category. There *is* a "core of easily identifiable and constitutionally proscribable conduct that the [ordinance] prohibits." Cf. *Secretary of State of Md.* v. *J.H. Munson Co.*, 467 U. S. 947, 965-966 (1984). A trespassory placement of a burning cross or a Nazi swastika on private property is both clearly proscribed[11] and unquestionably proscribable. It also happens to be the conduct at issue in this case.

3. Public Property.

Leaving the clear areas behind, we press onward into the fog. Can this ordinance, limited by construction to "fighting words," constitutionally restrict the placement of swastikas, burning crosses, and possibly other symbols on public property, including public forums?

The question is not an easy one. "Fighting words," unfortunately, still exist in our society. Rallies by the Ku Klux Klan and by groups on the opposite extreme do, in fact, result in violence. See, *e.g.*, Jordan and Wheeler, "14 Hurt as Anti-Klan Protesters Clash with Police," Washington Post, Oct. 29, 1990, at A1, col. 2.

On the other hand, rallies go to the very core of First Amendment freedom. If *Chaplinsky* really prohibits use of these symbols in rallies, modification of its rule may well be in order.

E. Overbreadth and the Present Case.

At this point, past protests about the overbreadth doctrine strike a strong, resonant chord. Should difficult questions

---

11. The ordinance has vagueness problems as applied to other symbols. R.A.V. has no standing to complain of this vagueness. *Parker* v. *Levy*, 417 U. S. 733, 756 (1974).

about public forums be answered in a case centered on a family's front lawn, with the actual facts of the case "relegated to footnote status"? See *Lewis* v. *City of New Orleans*, 415 U. S. 130, 137 (1974) (Blackmun, J., dissenting). Should this Court expound upon the "fighting words" doctrine "in the context of imaginary events," *ibid*., rather than what really happened here? This Court has previously insisted that "fighting words" determinations require "careful consideration of the actual circumstances surrounding [the] expression. . . ." *Texas* v. *Johnson*, 491 U. S. 397, 409 (1989).

Overbreadth analysis is touted as more protective of the First Amendment, but it is not necessarily so. A holding that a statute is not overbroad may cut off whole categories of expressive conduct from the protection of the First Amendment without consideration of individual cases. *New York* v. *Ferber*, 458 U. S. 747, 780 (1982) (Stevens, J., concurring in the judgment). Affirming the Minnesota Supreme Court's rationale as well as its judgment could easily have the effect Justice Stevens warned of. It is far better, amicus submits, to adopt Justice Stevens' recommendation and resolve these questions only in concrete factual situations. *Id*., at 781.

In the present case, this can be done by considering the public and private property applications of the statute separately. Invalidity of one, even on overbreadth grounds, need not bring down the other. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 502 (1985). Why, then, should this Court unnecessarily decide a question of constitutional law in advance, violating a cardinal rule governing federal courts? See *id*., at 501.

The proper approach, amicus suggests, is this. Where the range of conduct covered by the statute is divisible into one region of clearly proscribable conduct, which includes the conduct before the Court, and another region presenting difficult questions, the case is not a proper one for the application of the overbreadth doctrine. The statute should be upheld as applied, and the questionable applications left for decision in a case which actually presents them. Amicus further submits that the present case falls in this category.

Alternatively, if the Court determines that this is a proper case for application of the overbreadth doctrine, and if the Court determines that the narrowing construction by the Minnesota Supreme Court is insufficient, then the partial invalidation rule of *Brockett* should apply. If the ordinance is invalid as to consensual placements on private property and placements not amounting to vandalism on public forum property, it is nonetheless clearly valid as to trespassory placements on private property. Therefore, under *Brockett*, it should be partially invalidated as far as necessary to cure the overbreadth, and no further.

CONCLUSION

The judgment of the Supreme Court of Minnesota should be affirmed.

Dated: August, 1991

Respectfully submitted,

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Counsel of Record

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

v.

CITY OF ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari
To The Minnesota Supreme Court

BRIEF *AMICUS CURIAE* OF THE NATIONAL BLACK WOMEN'S HEALTH PROJECT IN SUPPORT OF RESPONDENT

CATHARINE A. MACKINNON*
625 S. State Street
Ann Arbor, Michigan 48109-1215
(313) 747-4046

BURKE MARSHALL
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4953

Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONSENT OF PARTIES	1
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE CHALLENGED ORDINANCE PROMOTES THE COMPELLING GOVERNMENTAL INTEREST IN EQUALITY, OUTWEIGHING FIRST AMENDMENT CONCERNS	5
A. The ordinance prohibits discriminatory practices which violate and undermine the equality rights of target groups	5
B. The practices of inequality prohibited by § 292.02 are not protected by the First Amendment	13
II. AS APPLIED TO DISCRIMINATORY EXPRESSIVE CONDUCT, § 292.02 IS NOT SUBSTANTIALLY OVERBROAD	24
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Adderley v. State of Florida, 385 U.S. 39 (1966) 26

Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977) *aff'd.*, 631 F.2d 178 (2d Cir. 1980) 11

Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456 (1991) .17, 18

Beauharnais v. Illinois, 343 U.S. 250 (1952) 24

Blow v. North Carolina, 379 U.S. 684 (1965)..... 11

Bob Jones Univ. v. U.S., 461 U.S. 574 (1983)..... 25

Bohen v. East Chicago, 799 F.2d 1180 (7th Cir. 1986)..... 10

Broadrick v. Oklahoma, 413 U.S. 601 (1973) ... 4, 25, 26

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 25

Brown v. Board of Education, 347 U.S. 483 (1954) .16, 22

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ..3, 26

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)..... 22

Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) *cert. denied*, 439 U.S. 916 (1978)..... 14, 19, 24

Cohen v. California, 403 U.S. 15 (1971)..... 14

Community for Creative Non-Violence v. Watt, 468 U.S. 288 (1984) 20

Continental Can v. State, 297 N.W.2d 241 (Minn., 1980)..... 10

Davis v. Passman, 422 U.S. 228 (1971)..... 11

TABLE OF AUTHORITIES – Continued

Page

Ford v. Hollowell, 385 F. Supp. 1392 (N.D. Miss. 1974)..... 6, 7

Friend v. Leidinger, 446 F. Supp. 361 (E.D. Va. 1977) *aff'd*, 588 F.2d 61 (4th Cir. 1978) 10

Gooding v. Wilson, 405 U.S. 518, 530 (1972)..... 13, 26

Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964) 9

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)..... 10

Hicks v. Gates Rubber, 928 F.2d 966 (10th Cir. 1991)..... 10

Hishon v. King & Spalding, 467 U.S. 69 (1983)..... 16

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 11

Korematsu v. U.S., 323 U.S. 214 (1944) 3

Lac du Flambeau Indians v. Stop Treaty Abuse-Wis., 759 F. Supp. 1339 (W.D. Wis. 1991)..... 17

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) 26

Loving v. Virginia, 388 U.S. 1 (1967) 23

Marshall v. Bramer, 110 F.R.D. 232 (W.D. Ky. 1985) ..6, 12

Matter of Welfare of R.A.V., 464 N.W. 2d 507 (Minn. 1991)..... 3, 5, 25

McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985) 6

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 10

Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D. Tenn., 1981) 11

TABLE OF AUTHORITIES – Continued

Page

New York v. Ferber, 458 U.S. 747 (1982) 4, 14, 16, 25, 26

Norwood v. Harrison, 413 U.S. 455 (1973) 20

Palmer v. Thompson, 403 U.S. 217 (1971) 11

Pierson v. Ray, 386 U.S. 547 (1967) 11

Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Relations, 413 U.S. 376 (1973) 4, 14, 16

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 11

R. v. Keegstra, [1991] 2 W.W.R. 1 24

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) 10

Richmond v. J.A. Croson, 488 U.S. 469 (1989) 3

Roberts v. U.S. Jaycees, 468 U.S. 609 (1983) 3, 16, 20, 23, 24

Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991) 10, 11

Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) 10

State v. Miller, 398 S.E.2d 547 (1990) 18

Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988) 6, 8

Street v. New York, 394 U.S. 576 (1969) 14

Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1880) 11

Taylor v. Jones, 653 F.2d 1196 (8th Cir. 1981) 9

Texas v. Johnson, 491 U.S. 397 (1989) 18, 19, 20

U.S. v. Beaty, 288 F.2d 653 (6th Cir. 1961) 9

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Bruce, 353 F.2d 474 (5th Cir. 1965) 9

U.S. v. Eichman, 110 S.Ct. 2404 (1990) 19

U.S. v. Gresser, 935 F.2d 96 (6th Cir. 1991) 8

U.S. v. Lee, 935 F.2d 952 (8th Cir. 1991) 7, 8, 11, 14, 24

U.S. v. Long, 935 F.2d 1207 (1991) 8

U.S. v. O'Brien, 391 U.S. 367 (1968) 4, 14, 18

U.S. v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (E.D. La. 1965) 6

U.S. v. Orozco-Santilian, 903 F.2d 1262 (9th Cir. 1990) 14

U.S. v. Salyer, 893 F.2d 113 (6th Cir. 1989) 6, 7, 8

U.S. v. Worthy, 915 F.2d 1514 (11th Cir. 1990) 6, 8

Vance v. Southern Bell, 863 F.2d 1503 (11th Cir. 1989) 9

Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) 9

Vietnamese Fishermen's Ass'n. v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (1982) 17

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 22

Watts v. United States, 394 U.S. 705 (1969) 13

Watson v. Memphis, 373 U.S. 526 (1963) 11

Weiss v. U.S., 595 F. Supp. 1052 (E.D. Va. 1984) 10

TABLE OF AUTHORITIES – Continued

Page

STATUTORY AND OFFICIAL AUTHORITIES

Increasing Violence Against Minorities: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (1980) 12

St. Paul Minn.Leg.Code section 292.02 (1990) .... *passim*

Title 18 U.S.C. § 844(h)(1) 8

Title 42 U.S.C. § 241 8

Title 42 U.S.C. § 1971(b) 8

Title 42 U.S.C. § 1985(3) 8, 12

Title 42 U.S.C. § 2000b 9

Title 42 U.S.C. § 3631(a) 9

Title 42 U.S.C. § 3617 (1991) 9

SCHOLARLY AUTHORITIES

Alexander, The Ku Klux Klan in the Southwest (1965) 5

Baker, Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. L. Rev. 964 (1978) 21

Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) 23

Bollinger, The Tolerant Society (1986) 21

Emerson, The System of Freedom of Expression (1970) 21

Goldberg, Hooded Empire (1981) 5

Katz, The Invisible Empire (1986) 6

TABLE OF AUTHORITIES – Continued

Page

Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke Law Journal 901 16

Major, Including Black Women, Midwest Academy Citizen Action 1991 Conference, Rebuilding America (July 26-28, 1991) 2

Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989) 12

Meiklejohn, Free Speech and its Relation to Self-Government (1948) 21

National Black Women's Health Project, Annual Report (1989) 1

Padgett, Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies, 75 J. Crim. L. 103 (1984) 6

Wade, The Fiery Cross (1987) 5, 6

CONSENT OF PARTIES

Letters of petitioner and respondent consenting to the filing of this brief are being filed separately with it.

INTEREST OF *AMICUS*

The National Black Women's Health Project (NBWHP) is a national grassroots self-help and health advocacy organization that is committed to improving the overall health status of Black women. The core program is based on the concept and practice of self-help and inclusion of all African American women, with a special focus on women living on low incomes. Health is not merely the absence of illness, but the active promotion of emotional, mental and physical wellness of present and future generations. Fundamental to this goal is the eradication of racism, sexism, and poverty in society, and with it the dramatically disproportionate health risks and lower life expectancy to which Black families and communities are subjected. National Black Women's Health Project, *Annual Report* 1, 2, 16 (1989).

The NBWHP began in 1981 as a pilot program of the National Women's Health Network, was incorporated as a non-profit organization in 1984, and has become internationally recognized as an advocacy organization by and for Black women. Since its inception, it has grown to more than 150 chapters in 26 states, with over 2,000 members participating, including members in St. Paul. In 1990, its National Public Policy and Education Office in Washington, D.C. was established to provide a national

forum to ensure that the information, data, and perspectives of the NBWHP will have an impact on policy development affecting the health and well-being of African American women.

NBWHP has observed that thousands of African American women experience some form of continuing social and psychological stress due to the combined effects of inequality based on race, sex, and class. This stress is directly related, both as cause and effect, to the staggering and disproportionate degree of illness experienced by African American women. For the estimated 14 million African American women living in the United States, life expectancy is shorter and maternal and infant mortality rates are higher than those of white women. This disparity is manifested not only in those areas considered traditional health concerns of women, such as obstetrics and gynecology, but in a wide array of chronic conditions such as lupus, diabetes, hypertension, cardiovascular disease, and certain cancers, from which African American women are more likely to die than are their white counterparts. Major, Including Black Women, speech at Midwest Academy Citizen Action 1991 Conference, Rebuilding America (July 26-28, 1991) 3-5 (presenting data). The life expectancy in the African American community lags three decades behind that of whites. *Id.* at 3. As workers and heads of households, childbearers and nurturers, African American women and other women of color have borne the brunt of these inequalities. Illness and disease are thus sensitive indicators of social inequality as well as social harms to be rectified.

Racist practices such as crossburnings and other exemplary acts of terrorist bigotry dramatically affect both the material and psychological context within which African American women and their communities exist. Such acts cause tremendous mental and emotional damage, create long-lasting dread and well-founded apprehension for security of the person, and demand a response as a means of attempting to reestablish self-respect and security and ensuring survival. Living in a state of seige is not conducive to health because it limits access to that equality of rights without discrimination which is essential to human flourishing.

SUMMARY OF ARGUMENT

The Minnesota Supreme Court upheld St. Paul Minn. Leg. Code section 292.02 (1990) ("§ 292.02") by authoritatively construing it as limited to "fighting words" under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), thus applying only to expressive conduct which falls outside First Amendment protection. *Matter of Welfare of R.A.V.*, 464 N.W. 2d 507 (Minn. 1991). While accepting this analysis, the National Black Women's Health Project respectfully submits that the ordinance promotes the government's "compelling interest in eradicating discrimination," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1983) (sex discrimination), *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (racial discrimination constitutionally suspect), *Richmond v. J.A. Croson*, 488 U.S. 469, 494 (1989) (same) in a way which outweighs First Amendment interests.

Crossburning, of which defendant R.A.V. is accused, should be recognized as a terrorist hate practice of intimidation and harassment which, contrary to the purposes of the Fourteenth Amendment, works to institutionalize the civil inequality of protected groups. As applied to petitioner and others who engage in related practices, the statute in question does not violate the First Amendment because social inequality, including through expressive conduct, is a harm for which states are entitled leeway in regulation. *New York v. Ferber*, 458 U.S. 747 (1982) (harm to mental and physical health of children used in child pornography justifies its regulation); *Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Relations*, 413 U.S. 376 (1973) (interest in eradicating sex discrimination outweighs First Amendment interest in sex-segregated advertising); *U.S. v. O'Brien*, 391 U.S. 367, 376-377 (1968) (communicative conduct may be regulated under specific conditions). The goal of eradicating inequality is advanced narrowly, leaving ample room for less coercive and harassing means of expressing the same message.

Applied, as here, to discriminatory expressive action, § 292.02 significantly advances equality and damages freedom of expression virtually not at all. The compelling interest in eradicating discrimination justifies any impact that application of the statute, as narrowed by the Minnesota Supreme Court and justified herein, may have on the expressive freedoms of perpetrators of symbolic acts of bigotry. Because the legitimate reach of § 292.02 dwarfs any arguably impermissible applications, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the ordinance is not unconstitutionally overbroad.

ARGUMENT

I. THE CHALLENGED ORDINANCE PROMOTES THE COMPELLING GOVERNMENTAL INTEREST IN EQUALITY, OUTWEIGHING FIRST AMENDMENT CONCERNS.

A. The Ordinance Prohibits Discriminatory Practices Which Violate And Undermine The Equality Rights Of Target Groups.

On its face, § 292.02 prohibits, with qualifications, the placing of "a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika" on public or private property. The qualifications include a *scienter* requirement ("knows or has reasonable grounds to know"), injurious or dangerous consequences ("arouses anger, alarm, or resentment in others"), and a traditional prohibited basis on "race, color, creed, religion, or gender." This case applies the statute to an incident in which white youths allegedly burned a cross on the lawn of the one African American family in a St. Paul neighborhood. *Matter of Welfare of R.A.V.*, 464 N.W. 2d 507 (Minn. 1991).

The flaming cross is a well-recognized symbol of racial and religious hatred and instrument of persecution and intimidation, historically directed principally against Blacks and Jews. By the 1920's, the Ku Klux Klan – a white supremacist racial hate organization which is secret, violent, authoritarian, xenophobic, and rabidly prejudiced – made it the emblem of its presence and the precursor of arson, firebombing, torture, and lynching. See generally Wade, THE FIERY CROSS (1987); Goldberg, HOODED EMPIRE (1981); Alexander, THE KU KLUX

KLAN IN THE SOUTHWEST (1965); Katz, THE INVISIBLE EMPIRE (1986). One federal district court found that

> . . . . to attain its end, the klan exploits the forces of hate, prejudice, and ignorance. We find that the klan relies on systematic economic coercion, varieties of intimidation, and physical violence in attempting to frustrate the national policy expressed in civil rights legislation. . . . [K]lansmen pledge their first allegiance to their Konstitution and give their first loyalty to a cross in flames. *U.S. v. Original Knights of the Ku Klux Klan,* 250 F. Supp. 330, 334, 335 (E.D. La. 1965).

Crossburning was also directed against Jews by the Nazis in Germany in the 1930s. Wade, 185. Crossburning, coupled with violence, motivated by invidious animus, has continued to the present day, escalating in recent years. *McMullen v. Carson,* 754 F.2d 936, 938 (11th Cir. 1985); *Marshall v. Bramer,* 110 F.R.D. 232, 235-237 (W.D. Ky. 1985) (collecting cases); Padgett, Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies, 75 J. Crim. L. 103 (1984).

Courts have recognized that crossburning threatens violence, *Stevens v. Tillman,* 855 F.2d 394 (7th Cir. 1988), and is a "particularly invidious act when directed against a black American," *U.S. v. Salyer,* 893 F.2d 113, 117 (6th Cir. 1989), one which produces "fear, anxiety, and apprehension for safety" among Black men, *Ford v. Hollowell,* 385 F. Supp. 1392, 1397 (N.D. Miss. 1974). The Eleventh Circuit, in a case involving a conviction for crossburning, recognized that crossburning sought to intimidate a Black family. *U.S. v. Worthy,* 915 F.2d 1514, 1515 (11th Cir. 1990). The Eighth Circuit recently concluded that a "cross burning was an

especially intrusive act which invaded the substantial privacy interests of its victims in an essentially intolerable manner." *U.S. v. Lee,* 935 F.2d 952, 956 (8th Cir. 1991). The Sixth Circuit observed similarly that "a black American would be particularly susceptible to the threat of cross burning because of the historical connotations of violence associated with the act." *Salyer,* 893 F.2d 116. That crossburning is a threatening act on the basis of race is uncontested.

Indeed, there is no doubt in anyone's mind what crossburning connotes, conveys, portends, or does. In *U.S. v. Lee,* Lonetta Miller, a seventy-one year old Black woman testified on cross-examination as follows:

> Q: Could you tell the ladies and gentlemen of the jury what a cross burning means, whether it is in the south or anywhere else?
>
> A: Well it is a form of intimidation; the ku klux klan uses it for threats; promises of violence, and that sort of thing. From what I understand a lot of the cross burnings in the south during the civil rights movement preceded hangings and that sort of thing. 935 F.2d, 956 n.5.

The Eighth Circuit observed there that defendants' crossburning "was tantamount to intimidation by threat of physical violence. It was not mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people." 935 F.2d, 956.

All of the cases discussed above involved complaints of crossburning in a context of inequality claims. Crosses have been found burned to intimidate Blacks out of voter registration in a jury selection case, *Ford v. Hollowell,*

385 F. Supp. 1392 (N.D. Miss. 1974); to induce targets to refrain from exercising federally assured rights such as travel, association, and speech under 42 U.S.C. § 1985(3), *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988); and to threaten and intimidate citizens from the free exercise or enjoyment of a civil right under 42 U.S.C. § 241, *U.S. v. Salyer*, 893 F.2d 113 (6th Cir. 1989), *U.S. v. Worthy*, 915 F.2d 1514 (11th Cir. 1990).

Two recent Court of Appeals decisions are particularly apposite to the instant case. In one, the defendant was charged with conspiracy to interfere with housing rights by force or threat of force for burning a cross within sight of an African American family's home. *U.S. v. Lee*, 935 F.2d 952 (8th Cir. 1991) (upholding civil rights claim under 42 U.S.C. § 3631(a) over First Amendment defense). In another, the defendant pled guilty, *inter alia*, to interference with housing rights, stating in the plea agreement that defendants "decided to burn the cross in the victims' yard 'because of the family's race and their presence in the neighborhood . . .' " *U.S. v. Long*, 935 F.2d 1207, 1209 (11th Cir. 1991) (allowing race to be taken into account as a fact in sentencing enhancement).[1]

Existing equality law has long recognized similar practices as violations of civil rights. Title 42 U.S.C. § 1971(b) provides that "no person . . . shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering

[1] Some of these cases, such as *Worthy*, also invoke 18 U.S.C. § 844(h)(1), use of fire in the commission of a federal felony. *See e.g., U.S. v. Gresser*, 935 F.2d 96 (6th Cir. 1991).

with the right of such other person to vote or to vote as he may choose . . . " Where sharecropper-tenants in possession of real estate under contract are threatened, intimidated or coerced by landlords for the purpose of interfering with their rights of franchise, *U.S. v. Bruce*, 353 F.2d 474 (5th Cir. 1965); *U.S. v. Beaty*, 288 F.2d 653 (6th Cir. 1961), burning a cross to attempt to intimidate a person out of their voting rights should clearly be covered as well. Similarly, 42 U.S.C. § 2000b provides for an action for threatened loss of equal access to public facilities, under which burning a cross would obviously be included. Crossburning to exclude from housing rights, as in the case at bar, is covered under 42 U.S.C. Section 3631(a), which prevents intimidation of "any person because of his race, color, religion, sex . . . " from exercising rights to fair housing. *See also* 42 U.S.C. § 3617 (1991).

In upholding Title II of the Civil Rights Act of 1964's equal accommodations provision, this Court emphasized that its "fundamental object . . . was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access . . . " *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 250 (1964). Cowering in terror at night with your family on the floor of your own home in the light of a terrorist cross burning on your lawn is surely a deprivation of personal dignity equal to not being permitted to stay overnight in a motel on the road.

Other civil rights rubrics have long permitted civil actions for conduct covered under § 292.02. Behavior such as hanging a noose over a desk, *Vance v. Southern Bell*, 863 F.2d 1503 (11th Cir. 1989) or in a supply room, *Taylor v. Jones*, 653 F.2d 1196 (8th Cir. 1981), or writing "KKK" on a tool shed in a workplace, *Vaughn v. Pool*

Offshore Co., 683 F.2d 922 (5th Cir. 1982) are legally actionable as discriminatory harassment on the basis of race. Placing pornography in the workplace, arguably a type of conduct based on gender under § 292.02, has been recognized as discriminatory sexual harassment under Title VII. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (posting sex pictures is sexual harassment over First Amendment defense); *but cf. Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (posting sex pictures is not sexual harassment because pornography is pervasive; no First Amendment defense raised).

Purely verbal harassment is unproblematically actionable as racial or sexual discrimination or both under state and federal human rights laws. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (racial epithets); *Friend v. Leidinger*, 446 F. Supp. 361 (E.D. Va. 1977), *aff'd.*, 588 F.2d 61 (4th Cir. 1978) (racial harassment); *Weiss v. U.S.*, 595 F. Supp. 1052 (E.D. Va. 1984) (anti-Semitic epithets). Examples of sexual harassment include *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bohen v. East Chicago*, 799 F.2d 1180, 1189 (7th Cir. 1986) (Posner, J., concurring) (sexual abuse and vilification); *Hicks v. Gates Rubber*, 928 F.2d 966 (10th Cir. 1991) (racial and sexual harassment); *Continental Can v. State*, 297 N.W.2d 241, 245-246 (Minn. 1980) (defendant "wished slavery days would return so that he could sexually train [plaintiff] and she would be his bitch," in action for sexual harassment under state human rights law).

Discrimination, it should be noted, is typically effectuated through words like "you're fired;" "it was essential that the understudy to my administrative assistant be a man," *Davis v. Passman*, 422 U.S. 228, 230 (1971); and posted signs stating "whites only." *See, e.g., Palmer v. Thompson*, 403 U.S. 217 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Blow v. North Carolina*, 379 U.S. 684 (1965); *Watson v. Memphis*, 373 U.S. 526 (1963); *see also Pierson v. Ray*, 386 U.S. 547 (1967). Other common examples include "did you get any over the weekend?" *Morgan v. Hertz Corp.*, 542 F. Supp. 123, 128 (W.D. Tenn. 1981), "sleep with me and I'll give you an A," *Alexander v. Yale Univ.*, 459 F. Supp. 1, 3-4 (D. Conn. 1977), *aff'd.*, 631 F.2d 178 (2d Cir. 1980), and "walk more femininely, talk more femininely, dress more femininely, wear makeup, have [your] hair styled, and wear jewelry," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). Nearly every time a refusal to hire or promote or accommodate is based on a prohibited group ground, some verbal act either constitutes the discrimination or proves it.

To the knowledge of *amicus*, the First Amendment has been raised as a defense in none of these cases, other than to be rejected in *Robinson* (pornography) and *Lee* (crossburning). Section 292.02 merely covers by express language a small subset of facts that civil rights statutes and rubrics have, without First Amendment controversy, been permitted to cover under far broader prohibitions for decades.

The civil rights approach favors the prohibition of all invidious treatment that has as its consequence "implying inferiority in civil society" for individuals on the basis of their membership in identifiable social groups. *Strauder v.*

West Virginia, 100 U.S. (10 Otto) 303, 308 (1880). In a context of social inequality, the practices prohibited by § 292.02 form integral links in systematic social discrimination. They work to keep target groups in socially isolated, stigmatized, and disadvantaged positions through the promotion of fear, intolerance, segregation, exclusion, disparagement, vilification, degradation, violence, and genocide. The harms range from immediate psychic wounding and attack, Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2365-66 (1989), to well-documented consequent physical aggression. *Increasing Violence Against Minorities: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 124-25 (1980). As terrorist acts of social subordination, they effectuate inequality through coercion, intimidation and harassment.

In this approach, the placing of Nazi swastikas promotes the inequality of Jews on the basis of religion (and creates a false racial identification that has had genocide as its consequence). Crossburnings promote white supremacy – in this case, the inequality of African-Americans to whites – on the basis of race and color. Such symbolic acts of social inequality are thus discriminatory practices, an expressive form inequality takes. In the instant case, the threat, although group-based, was directed against a specific family. Their injuries were not merely subjective, nor can their fears be said to be unfounded. *See e.g. Marshall v. Bramer*, 110 F.R.D. 232 (W.D. Ky. 1985) (Black couple whose home was destroyed by arson after cross burning brings § 1985(3) action against Klan as an organization). The statute's "alarm"

translates into moving out to avoid getting killed; its "anger" and "resentment" could well, in a healthy person, become striking back in self-defense or in defense of one's human dignity. "There is no persuasive reason to wipe the statute from the books, unless we want to encourage victims of such verbal assaults to seek their own private redress." *Gooding v. Wilson*, 405 U.S. 518, 530 (1972) (Burger, J., dissenting).

At minimum, acts such as crossburnings further the social construction of a group as inferior, unequal, and rightly disadvantaged. On a material level, many African Americans were driven out of the South and forced to relocate in places like Minnesota as a result of such acts. Systematic liquidation due to membership in a group, as occurred to Jews and others during the Holocaust, is the ultimate inequality of which acts such as crossburning are an integral part. In the case at bar, the crossburning is an act of exclusion of Black residents from a neighborhood where they have an equality right to live. It is a euphemism to say that this is what such acts communicate when the fact is that this is what they *do*.

B. The Practices Of Inequality Prohibited By § 292.02 Are Not Protected By The First Amendment.

Crossburning is expressive action which promotes racial inequality through its racist message and impact, engendering terror and effectuating segregation. It inflicts its harm through its meaning, as all threats do. Intimidation by threats of physical violence is not protected by the First Amendment. *See, e.g., Watts v. United*

States, 394 U.S. 705, 707 (1969); *U.S. v. Orozco-Santilian,* 903 F.2d 1262, 1265 (9th Cir. 1990). But physical violence does not mark the constitutional line beyond which legislation is impermissible. *U.S. v. Lee,* 935 F.2d 952, 956 (8th Cir. 1991). Where the harm the expression does to the emotional, physical, and mental health of vulnerable groups – groups the state has an interest in protecting – outweighs its expressive value, even pure speech, on balance, can be restricted. *New York v. Ferber,* 458 U.S. 747 (1982). Where the state interest is in eradicating discrimination, and the speech interest is not of the highest order, even written words can be regulated. *Pittsburgh Press v. Pittsburgh Comm'n. on Human Relations,* 413 U.S. 376 (1973). With expressive conduct, a compelling governmental interest, narrowly pursued, can outweigh a First Amendment interest. *U.S. v. O'Brien,* 391 U.S. 367 (1968). Assuming *arguendo* that crossburning, a public show of force, falls within the scope of the First Amendment, under these combined tests, crossburning may readily be prohibited as under § 292.02.

The traditional approach to a statute such as § 292.02 is to construe it as kind of a prohibition on group defamation, as petitioner and his *amici* ACLU *et al.* have done. This fails to recognize the overriding importance of equality interests where the treatment of suspect classes based on race or gender are involved. When abused through speech, the victim's harm – hence the state's interest in regulation – has traditionally been conceived as protection of sensibilities from offense or guarding of emotional tranquility. *Cohen v. California,* 403 U.S. 15 (1971); *Street v. New York,* 394 U.S. 576, 592 (1969). The harm of the type of conduct covered by § 292.02 has

traditionally sounded more in defamation – injury to group reputation – than discrimination – injury to group status and treatment. While defamation recognizes damage, its damage is more ideational and less material than the damage of discrimination, which recognizes the harm of second-class citizenship and inferior social standing with attendant material deprivation of access to resources, voice, and power. Certainly, being treated as a second-class citizen furthers the second-class reputation of the group of which one is a member, even as a demeaned reputation permits and encourages social denigration and exclusion. But equality is an interest of Constitutional dimension; repute, however weighty, is not. The failure to recognize the equality interest at stake in "group libel" statutes, *see e.g. Collin v. Smith,* 578 F.2d 1197, 1199 (7th Cir. 1978) (ordinance prohibiting parade permit for assemblies which, *inter alia,* incite violence, hatred, abuse or hostility "by reason of reference to religious, racial, ethnic, national or regional affiliation") *cert. denied,* 439 U.S. 916 (1978), has trivialized the harm and obscured the state interest, disabling the constitutional defense of such laws against First Amendment attack.

In the civil rights context, it should be noted that segregated lunch counters or toilets or water fountains were not defended because of what they said – that is, as symbolic speech or as expressions of political opinion – although they were arguably both expressive and political. Racial segregation in education was not regarded as protected speech to the extent it required verbal forms, such as laws and directives, to create and sustain it, nor was it legally regarded as actionable defamation against

African Americans, although a substantial part of its harm was the message of inferiority it conveyed, as well as its impact on the self-concept of Black children. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954); *see also* Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke Law Journal 901 (*Brown* may be read as regulating the content of racist speech). Yet the harm of segregation and other racist practices is at least as much what it says as what it does, just as with crossburning, what it says is indistinguishable from what it does.

Where equality interests in regulating speech have been explicitly articulated, overwhelmingly they have prevailed. In *Pittsburgh Press*, because sex-segregated job advertisements "indicat[ed]" sex discrimination in employment, this Court concluded that such speech "signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions." *Pittsburgh Press v. Pittsburgh Comm'n. on Human Relations*, 413 U.S. 376, 389 (1973). A burning cross "signals" just as powerfully that African Americans are not welcome in the neighborhood. *See also Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Hishon v. King & Spalding*, 467 U.S. 69 (1983).

Where the harm of symbolic conduct is real rather than symbolic, the value of the expression should be weighed against the harm done. *New York v. Ferber*, 458 U.S. 757, 763-64 (1982) (harm of child pornography outweighs its expressive value). The value of crossburnings

"is exceedingly modest, if not *de minimus*." 459 U.S. 762. Indeed, its only value lies in the harm it does.[2]

In the civil rights context, courts have increasingly rejected First Amendment protections for racist harassment and intimidation, including through symbolic means. In the *Vietnamese Fishermen's* case, the court enjoined defendants from engaging in acts of violence, intimidation, or harassment under 42 U.S.C. §§ 1981, 1983 and 1985 for symbolic acts including hanging an effigy of a Vietnamese fisherman, walking around with guns, and "burning crosses on property within the geographic area where members of plaintiffs' class live and/or work without the consent of the owner of said property." *Vietnamese Fishermen's Ass'n. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 220 (S. D. Tex. 1982). Similarly, in the *Lac du Flambeau Indians* case, the court, finding a claim under 42 U.S.C. § 1985(3) based on a "campaign driven by racial hostility toward Indians" as evidenced by verbal racial insults, found an injunction against such activities outside First Amendment scope. *Lac du Flambeau Indians v. Stop Treaty Abuse-Wis.*, 759 F. Supp. 1339, 1349, 1353 (W.D. Wis. 1991).

In a related recognition, the Supreme Court of Georgia recently upheld an anti-mask law against a free

---

[2] Outside the recognized civil rights context, but invoking similar concerns, Justice Souter, concurring in *Barnes v. Glen Theatres, Inc.*, expressed a similar rationale for upholding a restriction on nude dancing based on its "secondary effects," there, increased prostitution and sexual assault. 111 S.Ct. 2456, 2470. In the instant case, racial exclusion and intimidation is the primary, indeed only, effect of the expression, making its avoidance even weightier.

speech challenge, recognizing that the Klan's practice of wearing masks worked to "intimidate, threaten, or create an environment for impending violence," hence was not protected speech, in a factual context in which the mask-wearing "helped to create a climate of fear that prevented Georgia citizens from exercising their civil rights." *State v. Miller,* 398 S.E.2d 547, 550 (1990). Crossburnings are at least as harassing, intimidating, and obstructive of protected rights.

Conduct that communicates may invoke the First Amendment but is not necessarily protected speech. This Court permits expressive conduct to be regulated more readily than other expression. It looks to see if such regulation "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *U.S. v. O'Brien,* 391 U.S. 367, 376-377 (1968). *See also Barnes v. Glen Theatre, Inc.,* 111 S.Ct. 2456 (1991) (nude dancing case, reaffirming and adumbrating *O'Brien*). Harm to a state interest does not become protected as speech because it makes a statement in inflicting an injury. As clarified in *Texas v. Johnson,* "a law directed at the communicative nature of the conduct must . . . be justified by the substantial showing of need that the First Amendment requires . . . It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid." *Texas v. Johnson,* 491 U.S. 397, 406-407 (1989) (flag-burning case).

The recent cases on flag-burning found the statutes regulating it impermissible because they lacked a sufficient governmental interest other than that of suppressing a particular form of criticism of the government. The expression of an idea through conduct may not be regulated "simply because society finds the idea itself offensive or disagreeable." *Johnson,* 491 U.S., 414. The Court in *dicta* emphasized the inadequacy of offensiveness as a harm: "[w]e are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets . . . " *U.S. v. Eichman,* 110 S. Ct. 2402, 2410 (1990). Protected groups are not in a position of power comparable to that of the government, and, in reality, nothing is done to the country when its symbol is burned. By contrast, crossburning, if unpunished, is tantamount to racial supremacy and exclusion, like a "white only" sign only nonverbal. Like most acts, crossburning expresses an idea, but unlike other expressions of ideas, it is threatening and coercive conduct on the basis of race. As noted by the Seventh Circuit in *Collin v. Smith,* "It bears noting that we are not viewing here a law which prohibits action designed to impede the equal exercise of guaranteed rights . . . or even a conspiracy to harass or intimidate others and subject them thus to racial or religious hatred . . . If we were, we would have a very different case." 578 F.2d, at 1204, n.13. Creating a First Amendment exception for an injured flag is not the same as recognizing the state interest in protecting from discrimination terrorized and constructively evicted Black citizens awaiting what may well be a firebombing or a lynch mob.

This Court has made clear that, "concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive" must, as a matter of principle, remain disputed in the marketplace of ideas. *Johnson*, 491 U.S., 417. The marketplace of ideas cannot be assumed to be an equal place in a society in which some groups are systematically unequal to others. But this reality need not be confronted here, since the idea of racial equality can remain disputed in St. Paul. The city, through § 292.02, does not enforce its views in a dialogue on racial equality, nor has St. Paul here adopted the instant regulation of crossburning "because of disagreement with the message it conveys." *Community for Creative Non-Violence v. Watt*, 468 U.S. 288, 295 (1984). Rather, this expressive conduct is prohibited because it inflicts inequality through the delivery of its message. As this Court observed in *Jaycees*, upholding an equality claim over a First Amendment association challenge, "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit . . . Accordingly . . . such practices are entitled to no constitutional protection." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). That the content of the message is politically racist does not, *ipso facto*, make it protected speech. "[I]nvidious private discrimination may be characterized as a form of exercising freedom . . . protected by the First Amendment, but it has never been accorded affirmative constitutional protection." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). This case is not the time to start.

For St. Paul to side with equality as a basis for public policy is not the same as officially imposing a conclusion on a dialogue. A crossburning is not a dialogue, it is a discriminatory act. The state need not remain neutral when racial inequality is practiced, including through expressive conduct. A law against crossburning means only that second-class citizenship may not be imposed in this way. When equality is a constitutional mandate, the idea that some people are inferior to others on the basis of group membership has been authoritatively rejected as the basis for public policy. Practices based on this idea are not insulated from regulation on the ground that the ideas they express cannot be rejected by law, nor are legislative attempts to address such practices invalid because they take a position in favor of human equality.

Burning crosses, placing Nazi swastikas, and posting pornography in workplaces serve none of the purposes for which speech is protected, any more than verbal racial and sexual harassment or "white only" signs do. Free speech is valued because it encourages political dissent, debate, and participation in self-government, Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970), Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948); promotes diversity, tolerance, and self-restraint, Bollinger, THE TOLERANT SOCIETY 9-11 (1986); manages social change and social conflict, Emerson, at 7; advances knowledge and promotes the discovery of truth, Mill, ON LIBERTY 16-52 (A. Castell ed. 1947); and promotes individual self-fulfillment, Baker, Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. L. Rev. 964, 995-996 (1978). The acts prohibited by § 292.02, by contrast, quash dissent by

silencing the voices of disadvantaged groups through terrorism, often insuring that the victims are so intimidated that the most aggressive and coercive verbal attacks upon them never become "fighting words" because they cannot or do not fight back.[3] Such acts also inhibit truth-seeking because they intimidate disadvantaged groups from asserting their truth and their point of view. They undermine social diversity through exclusion and discourage community participation by demeaning the human worth and self-esteem of their targets. If bigots are fulfilled through such acts, it is at the expense of a welcoming and tolerant environment for others.

The hatemongering prohibited by § 292.02 silences the speech of the less powerful as it marginalizes and segregates them. The official imprimatur of approval that would be secured for such conduct by protecting it as expression would do incalculable harm to the "hearts and minds," *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), of its victims, inhibiting progress toward civil equality, and delegitimating the First Amendment.

In prohibiting such practices, the St. Paul ordinance "responds precisely to the substantive problem which legitimately concerns" government and abridges no more freedom of speech than necessary to accomplish that purpose. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Moreover, the provision aims

[3] This is to suggest that the "fighting words" doctrine implicitly assumes an equality of social vulnerability, safety, and state solicitude that cannot be assumed for groups that have historically been the targets of discrimination.

to stop intimidation from protected rights and to advance equality, not to suppress dissident speech. While the content of the message of a burning cross may represent dissent from the national consensus reflected in legal mandates of equality, it offers no dissent from the overwhelming reality of racial inequality that continues to afflict social life. Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987). Cross-burning should not be romanticized as a lonely and unheeded critique of a powerful *status quo*. Its racism entrenches, embodies, and advances society's most repressive and antiegalitarian norms, indefensible in a society that has equality as a constitutional guarantee.

If St. Paul burned a cross at an official ceremony, it would discriminate on the basis of race in violation of the Fourteenth Amendment. The fact the conduct was expressive would be no defense. This would be as virulent and shocking an act "designed to maintain White Supremacy" as has ever been seen. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating antimiscegenation laws). What would be discriminatory for government to do can be recognized as discriminatory in society through legislation. By prohibiting such conduct when it occurs between its citizens, the city acts against socially institutionalized inequality and, indirectly, against the negative group animus that drives it.

Section 292.02 is as much an equality provision as if it were part of the human rights code. Like the provision upheld over First Amendment concerns in *Jaycees*, the ordinance reflects Minnesota's historically "strong commitment to eliminating discrimination and assuring its

citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). Had equality been recognized as the constitutional interest at stake in group defamation, it would have supported Justice Frankfurter's opinion upholding Illinois' statute in *Beauharnais*, not overruled to this day, that "a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits." *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952). It would also support the reservations based on *Beauharnais* expressed by some members of this Court in the *Skokie* case. *Smith v. Collin*, 439 U.S. 916 (1978) (Blackmun, J., with whom White, J., joins, dissenting from denial of *cert.* to resolve possible conflict with *Beauharnais*). See also *R. v. Keegstra*, [1991] 2 W.W.R. 1 (Supreme Court of Canada upholding hate propaganda statute on equality rationale under *Canadian Charter of Rights and Freedoms*). As the Eighth Circuit concluded in an action for a crossburning, "[t]o protect the inhabitants of this nation from such an attack on civil rights does not violate the spirit of the first amendment." *U.S. v. Lee*, 935 F.2d 952, 956 (8th Cir. 1991).

II. AS APPLIED TO DISCRIMINATORY EXPRESSIVE CONDUCT, § 292.02 IS NOT SUBSTANTIALLY OVERBROAD.

First Amendment overbreadth doctrine provides an exception to the rule that a person to whom a statute may constitutionally be applied may not challenge it on grounds that it may conceivably be applied unconstitutionally to others in situations not before the court. The

concern is that a sweeping statute, or one incapable of limitation, can chill much protected expression before it can be stopped. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). As explained in *Broadrick*, the function of this exception,

> a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. 413 U.S., 615.

While the Court may have been thinking of conduct in which the harmful communicative impact is separate from the harm of the conduct as such, the considerations in permitting regulation are no less strong when the two are one, as here. The laws under which crossburning has previously been prohibited as a civil rights violation have long been recognized as valid. Crossburning, while expressive, is less "pure speech" and more conduct than is child pornography. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 n.12 (1985) ("The Court of Appeals erred in holding that the *Broadrick* substantial overbreadth requirement is inapplicable where pure speech rather than conduct is at issue. *Ferber* specifically held to the contrary."). The equality interests in eradicating racial discrimination, of which crossburning and related acts are instances, are "fundamental, overriding." *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 604 (1983) (equality as public policy upheld over free exercise claim). And § 292.02 has already been subjected to a limiting construction by the state court. *Matter of Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

Like the statute in *Ferber*, § 292.02 is "the paradigmatic case of a statute whose legitimate reach dwarfs its arguably impermissible applications," hence is not substantially overbroad. *New York v. Ferber*, 458 U.S. 747, 773. The overwhelming majority of the speech acts covered are already unprotected speech even apart from an equality rationale. There is no right to burn crosses on public property, *Adderley v. State of Florida*, 385 U.S. 39 (1966), or on the private property of another without permission, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). That leaves burning crosses with permission on others' property and on one's own property – a group of instances so small that the overbreadth doctrine, which is "strong medicine," *Broadrick*, 413 U.S. 613, is inappropriate. "The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel." *Ferber*, 458 U.S., 771.

This result is distinguishable from the invalidation on overbreadth grounds of a statute prohibiting "opprobrious words or abusive language" in *Gooding v. Wilson*, although the facts of both cases involve "bullying tactic[s]" *Gooding v. Wilson*, 405 U.S. 518, 535 (Blackmun, J., dissenting) which raise speech concerns. The statute at issue in *Gooding* was directed only to spoken words, not conduct, and, as applied, sought to safeguard the sensibilities of police officers rather than the equality rights of protected groups. Even so, some justices found *Chaplinsky* undermined by that overbreadth invalidation: "If this is what the overbreadth doctrine means, and if this is what it produces, it urgently needs re-examination." 405 U.S.,

537 (Blackmun, J., with whom Burger, C. J., joins, dissenting).

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

/s/ Catharine A. MacKinnon
CATHARINE A. MACKINNON*
625 S. State Street
Ann Arbor, Michigan 48109-1215
(313) 747-4046

BURKE MARSHALL
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4953

Attorneys for Amicus Curiae

* Counsel of Record

August 23, 1991

No. 90-7675

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The
Supreme Court of Minnesota

BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF RESPONDENT

Of Counsel:
Ruth L. Lansner
Jeffrey P. Sinensky
Steven M. Freeman
Michael A. Sandberg
Michael Lieberman
Tamar Sadeh Ellison
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

Allen I. Saeks
Counsel of Record
Mark S. Weitz
Timothy R. Meyerson
Lawrence P. Schaefer
Leonard, Street and Deinard
150 South Fifth Street
Suite 2300
Minneapolis, MN 55402
(612) 335-1500

BEST AVAILABLE COPY

QUESTION PRESENTED

May a local government criminalize the act of burning a cross on the private property of a black family under an ordinance limited by the state's highest court to prohibit only fighting words or conduct directed to inciting or producing imminent lawless action and likely to incite or produce such action?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

LEGAL ARGUMENT 4

I. Punishing Hate Crimes Advances Clear And Compelling Public Policy 4

II. A Municipality May Properly Prohibit Cross Burning When That Act Constitutes A Bias-Motivated Personal Attack 8

III. The Ordinance Is Not Overbroad Since It Prohibits Only Constitutionally Unprotected Conduct 14

A. The Ordinance Must Be Analyzed As Construed By The Minnesota Supreme Court 14

B. The Ordinance As Construed Prohibits Only Fighting Words And Conduct Inciting Imminent Lawless Action 16

IV. The Ordinance As Construed Is Not Void For Vagueness 18

V. The Ordinance As Construed Is Consistent With Supreme Court Precedent Applying The Fighting Words Doctrine 20

CONCLUSION 27

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Beauharnais v. Illinois, 343 U.S. 250 (1952) . . . 18

Boos v. Barry, 485 U.S. 312 (1988) 9, 26

Brandenburg v. Ohio, 395 U.S. 444 (1969) . . 15-18

Cantwell v. Connecticut, 310 U.S. 296 (1940) . . 22

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 14-19, 21, 22

City of Houston, Texas v. Hill, 482 U.S. 451 (1987) 16

Coates v. Cincinnati, 402 U.S. 611 (1971) 15

Cohen v. California, 403 U.S. 15 (1971) . . . 21, 24

Colten v. Kentucky, 407 U.S. 104 (1972) 14

Cox v. Louisiana, 379 U.S. 536 (1965) 15

Dennis v. United States, 341 U.S. 494 (1951) . . 18

Eichmann v. United States, 496 U.S. ___, 110 S. Ct. 2404 (1990) 25

F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) 21

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 11

Gooding v. Wilson, 405 U.S. 518 (1972) . . . 15, 18

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 18

Karlan v. Cincinnati, 416 U.S. 924 (1974) 18

Kelly v. Ohio, 416 U.S. 923 (1974) 15

Kolander v. Larson, 461 U.S. 352 (1983) 14

Kunz v. New York, 340 U.S. 290 (1951) 18

Ladner v. United States, 358 U.S. 169 (1958) . . 11

Lewis v. New Orleans, 415 U.S. 130 (1974) 14, 16, 18, 23

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 12

Papish v. University of Missouri, 410 U.S. 667 (1973) 18

Parker v. Levy, 417 U.S. 733 (1974) 19

Plummer v. City of Columbus, 414 U.S. 2 (1973) 15

Rosen v. California, 416 U.S. 924 (1974) 15

Terminello v. Chicago, 337 U.S. 1 (1949) . . 14, 18

Texas v. Johnson, 491 U.S. 397 (1989) . 18, 24, 25

Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) 18

Watts v. United States, 394 U.S. 705 (1969) . . . 12

OTHER FEDERAL CASES

Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) 26

Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977) 12

Stevens v. Tillman, 855 F.2d 394 (7th Cir., 1988), *cert. denied*, 489 U.S. 1065 (1988) 11

U.S. v. Crenshaw County Unit of the United Klans of Am., 200 F. Supp. 181 (M.D. Ala. 1968) 11

U.S. v. Gresser, 935 F.2d 96 (6th Cir. 1991) . . . 11

U.S. v. Lee, 935 F.2d 952 (8th Cir. 1991) 9

U.S. v. Worthy, 915 F.2d 1514 (11th Cir. 1990) 11

United States v. Mitchell, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) 12

United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (E.D. LA. 1965) 11

United States v. Salyer, 893 F.2d 113 (6th Cir. 1989) 9

United States v. Skillman, 922 F.2d 1370 (9th Cir. 1991) 9

Vietnamese Fishermen's Ass'n v. Knight of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982) 11

STATE CASES

City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980) 15, 19

City of Minneapolis v. Lynch, 392 N.W.2d 700 (Minn. Ct. App. 1986) 15, 19

Commonwealth of Pennsylvania v. Koch 288 Pa. Super 290, 431 A.2d 1052 (1981) . . 10

In Re S.L.J., 263 N.W.2d 412 (Minn. 1978) . 15, 19

In the Matter of R.A.V., 464 N.W.2d 507 (Minn. 1991) 15, 19

People v. Grupe, 141 Misc. 2d 6, 532 N.Y.S. 2d 815 (N.Y. Crim. Ct. 1988) 7

State v. Beebe, 67 Or. App. 738, 680 P.2d 11 (Or. App. 1984) 7

State v. Klimek, 398 N.W.2d 41 (Minn. Ct. App. 1986) 16, 19

State v. Miller, 6 Kan. App. 2d 423, 629 P.2d 748 (1981) 9, 10

State v. Reed, No. 1006 (Tenn. Crim. App., April 18, 1985) (LEXIS, State library) . . 10

Village of Skokie v. National Socialist Party of America, 69 Ill. App. 2d 605, 373 N.E.2d 21 (1978) 26

STATUTES

Model Penal Code § 250.4(5) (1962) 11

R.I. Gen. Laws § 11-53-1 (Supp. 1987) 6

W.Va. Code § 61-6-21 (Supp. 1987) 6

Wash. Rev. Code § 9A.36.080(2) (Supp. 1990) 6

ORDINANCE

St. Paul, Minn. Ordinances Ch. 292, § 292.02 (1990) 2, 27

OTHER SOURCES

ADL Bulletin (March 1991) 4

ADL, *1990 Audit of Anti-Semitic Incidents* (1991) 4

ADL, *Electronic Hate: Bigotry Comes to TV* (1991) 4

ADL, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry* (1988 & Supp. 1990) 6

ADL, *Hate Crimes: Policies and Procedures for Law Enforcement Agencies* (1988) . . . 4

ADL, *Hate Groups in America: A Record of Bigotry and Violence* (1988) 4

ADL, *Neo Nazi Skinheads: A 1990 Status Report* (1990) 4

ADL, *Skinheads Target the Schools* (1989) 4

ADL, *The Hate Movement Today: A Chronicle of Violence and Disarray* (1987) 4

ADL, *Young and Violent: The Growing Menace of America's Neo-Nazi Skinheads* (1988) 4

Fallon, "Making Sense of Overbreadth," 100 Yale L.J. 853 (1991) 14

Hernandez, *Hate Crimes Rise Sharply, Panel Reports*, L.A. Times, Sept. 7, 1990, at B1, Col. 6 5

Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 Duke L.Rev. 431 10

Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 Mich. L. Rev. 2320 (1989) 22

Minnesota Advisory Committee to the United States Commission on Civil Rights, *Bigotry and Violence in Minnesota* (October 1989) 8

Minnesota Board of Peace Officer Standards and Training, *Bias Motivated Crimes: A Summary Report of Minnesota's Response* (1990) 5, 8

Minnesota Department of Public Safety, *Bias Offense Reporting System* (Feb. 11, 1991) 5

Shea, "Don't Bother to Smile When You Call Me That--Fighting Words and the First Amendment," 63 Kentucky L.J. 1 (1975) 18

Tribe, *Constitutional Law* (2d ed. 1988) . . . 12, 19

Tye, *Hate Crimes Increase, May Hit Record in '91*, Bost. Globe, April 14, 1991, at 26, Col. 2 5

Valentine, *Sharp Rise in Hate Crimes Reported by M' Commission*, Wash. Post, Sept. 15, 1990, at B1, Col. 2 5

STATEMENT OF INTEREST[1]

The Anti-Defamation League of B'nai B'rith (the "ADL") is one of this country's oldest civil rights organizations, having been founded in 1913 to advance good will and mutual understanding among all races and religions. The impetus for the ADL's founding was the unjust conviction for murder of a Jewish man, Leo Frank, in Atlanta. When the Governor of Georgia commuted Mr. Frank's sentence to life imprisonment, Mr. Frank was victimized by the ultimate hate crime--he was lynched.

For over 75 years, the ADL has been committed to fighting racial and religious discrimination in employment, housing, education and public accommodations, and to ensuring that every individual receives equal protection under the law. The ADL is equally committed to protecting the basic freedoms set forth in the Bill of Rights and is highly sensitive to the First Amendment issues raised by this case.

Consequently, the ADL is uniquely situated to suggest a balance of the difficult and competing interests presented by the instant case. It recognizes the paramount importance of protecting basic First Amendment privileges even where such privileges result in the expression of unpalatable ideas, but it also recognizes that bias-motivated crimes are increasing and that legislatures properly may provide a legal basis for punishing behavior which is indisputably criminal and motivated by racial, ethnic or religious hatred.

---

[1] Letters of Consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3.

Accordingly, the ADL believes that while St. Paul Ordinance § 292.02 (the "Ordinance") is not an ideal hate crimes statute, it validly addresses a growing social problem and, *as narrowly construed by the Minnesota Supreme Court*, passes Constitutional muster.

SUMMARY OF THE ARGUMENT

The Ordinance has been construed by the Minnesota Supreme Court to prohibit only "fighting words" or conduct that is directed to inciting or producing "imminent lawless action." This is a well-settled construction of the conduct prohibited by the Ordinance, i.e., that which provokes "anger, alarm or resentment." Only an outright rejection of the fighting words or imminent lawless action doctrines would justify a reversal of the lower court's decision.

The Petitioner, and Amici in support of his position, fail to recognize that the Ordinance, on its face and as construed, does not seek to ban entirely the burning of a cross, the display of a nazi swastika or other types of unpopular symbols. Rather, the St. Paul City Council and the Minnesota Supreme Court recognized that the context in which these symbols are displayed determines whether they are entitled to First Amendment protection. When not used in a personally threatening or assaultive manner, these symbols are part of the marketplace of ideas of which our society is justifiably tolerant; however, when used as a form of a bias-motivated personal attack, they cease to symbolize ideas and become violent tools that inflict injury. This Court has consistently recognized that this type of

"expression" should not be afforded First Amendment protection.

LEGAL ARGUMENT

I. Punishing Hate Crimes Advances Clear And Compelling Public Policy

The Ordinance under review is just one of a rapidly increasing number of laws recognizing and punishing hate crimes. Numerous legislative bodies, on both the state and local level, have attempted to come to grips with the problems caused by criminal behavior which is motivated by racial, ethnic or religious bias. More than half the states and the Federal Government have adopted hate crime statutes (*see* Appendix A attached hereto). Several states have laws which specifically target cross burning (*see* Appendix B attached hereto).

Statistics indicate a clear trend of increasing, and increasingly violent, hate crimes.[2] The ADL's *1990 Audit of Anti-Semitic Incidents* (1991) indicates that anti-semitic incidents reported to ADL offices nationwide have increased from 1432 in 1989 to 1685 in 1990; only 377 such acts were reported in 1980. *ADL Bulletin* (March 1991), at 3. State legislatures have found, and other studies have indicated, similar dramatic increases in crimes based on racial and ethnic animosity. In states that have adopted bias crimes reporting acts, law enforcement agencies are noting a disturbingly high number of hate crimes. *See, e.g.*, Minnesota Board of Peace Officer Standards and Training, *Bias Motivated Crimes: A Summary Report of Minnesota's Response* (1990), at 34 (105 hate crimes reported in last five months of 1989 compared to 49 for same period in 1988). The Minnesota Department of Public Safety recorded 307 hate crimes in 1990, 255 of which were committed based on the race of the victim, including seven cross burnings. Minnesota Department of Public Safety, *Bias Offense Reporting System* (Feb. 11, 1991).[3]

The legislature may validly determine that hate-motivated crimes are so damaging to the very fabric of society that they deserve special statutory treatment and should be punished as crimes in their own right, not just under general assault, trespass and other types of statutes.

> The damage done by hate crimes cannot be measured solely in terms of

---

[2] The ADL conducts its own nationwide annual audit of anti-semitic incidents (many of them criminal) and monitors hate groups. *See, e.g.*, ADL, *1990 Audit of Anti-Semitic Incidents* (1991); ADL, *Electronic Hate: Bigotry Comes to TV* (1991); ADL, *Neo Nazi Skinheads: A 1990 Status Report* (1990); ADL, *Skinheads Target the Schools* (1989); ADL, *Young and Violent: The Growing Menace of America's Neo-Nazi Skinheads* (1988); ADL, *Hate Groups in America: A Record of Bigotry and Violence* (1988); ADL, *Hate Crimes: Policies and Procedures for Law Enforcement Agencies* (1988); ADL, *The Hate Movement Today: A Chronicle of Violence and Disarray* (1987).

[3] Other states and municipalities have made similar findings. In Boston, 202 hate crimes were reported in 1989, compared to 273 in 1990. Tye, *Hate Crimes Increase, May Hit Record in '91*, Bost. Globe, April 14, 1991, at 26, Col. 2. The Maryland Commission on Human Relations reported an increase in assaults, arsons, cross burnings, vandalism and threats resulting from racial and ethnic prejudice from 398 in 1986 to 686 in 1989. Valentine, *Sharp Rise in Hate Crimes Reported by Md. Commission*, Wash. Post, Sept. 15, 1990, at B1, Col. 2. The Los Angeles County Human Relations Commission noted 378 hate crimes were reported in 1989, compared to 272 in just the first half of 1990. Hernandez, *Hate Crimes Rise Sharply, Panel Reports*, L.A. Times, Sept. 7, 1990, at B1, Col. 6.

> physical injury or dollars and cents. Hate crimes may effectively intimidate other members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. By making members of minority communities fearful, angry, and suspicious of other groups--and of the power structure that is supposed to protect them--these incidents can damage the fabric of our society and fragment communities. For these reasons, hate crimes demand a special response from law enforcement officials and civic leaders.

ADL, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism and Violent Bigotry* (1988 & Supp. 1990).

In adopting such laws, legislatures have articulated valid and compelling rationales for such legislation. For example, the legislature of the State of Washington noted that "by tradition the burning of a cross is a racially motivated action that is highly intimidating and represents a threat to the safety of the person or property of the victim." Wash. Rev. Code § 9A.36.080(2) (Supp. 1990). The General Assembly of Rhode Island found and declared that "it is the right of every person . . . to be secure and protected from fear, intimidation and physical harm . . ." based upon, *inter alia*, race. R.I. Gen. Laws § 11-53-1 (Supp. 1987). The West Virginia legislature declared that all persons within its boundaries have the right to be free from intimidation by threat of violence based on, *inter alia*, race. W.Va. Code § 61-6-21 (Supp. 1987).

Courts have not hesitated to give due deference to such legislative enactments. In *State v. Beebe*, 67 Or. App. 738, 740, 680 P.2d 11, 13 (Or. App. 1984), the court stated that the legislature may:

> legitimately determine that the danger to society from assaultive conduct directed toward an individual because of his race, religion or national origin is greater than the danger from such conduct under other circumstances. Assaultive behavior motivated by bigotry is directed not just at the victim but, in a sense, toward the group to which the particular victim belongs. Such confrontations therefore readily--and commonly do--escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases. . . .

Similarly, in *People v. Grupe*, 141 Misc. 2d 6, 8, 532 N.Y.S. 2d 815, 817 (N.Y. Crim. Ct. 1988), the court found that, in enacting a hate crime statute, "the legislature was responding to an increase in reported incidents of physical harassment of people and vandalism of property motivated by bias and sought to increase penal sanctions imposed for this type of conduct." A state-sponsored study had found that bias-related violence was increasing, that existing laws failed to protect victims of bias-related violence, and that "harassment and threats of violence designed to deprive minorities of equal access to housing has intensified." *Id* at 819. The court in *Grupe* noted that the power and duty of the

legislature to penalize such conduct was well established and that there was a compelling governmental interest in penalizing bias-related violence. *Id.*

Minnesota has a clearly articulated public policy of protecting citizens from violence, terror, harassment and intimidation based on race. The enactment of hate crimes legislation was preceded by the creation of the Governor's Task Force on Violence and Prejudice, which noted an alarming number of bias-motivated crimes. *Bias Motivated Crimes: A Summary Report of Minnesota's Response*, *supra*, at 20-22. Accordingly, it recommended a legislative package, including the adoption of penalty enhancement statutes and a bias crimes reporting act. The United States Civil Rights Commission, holding hearings in Minnesota, came to the same conclusion. Minnesota Advisory Committee to the United States Commission on Civil Rights, *Bigotry and Violence in Minnesota* (October 1989). The Ordinance at issue in this case clearly reflects this compelling public policy.

II. A Municipality May Properly Prohibit Cross Burning When That Act Constitutes A Bias-Motivated Personal Attack

A late-night cross burning in a black family's yard is an act of violence, terror, harassment and intimidation.

> After the mother saw the burning cross, she was crying on her knees in the living room. Upon seeing the cross, the mother felt feelings of frustration and

> intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: "murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person."

United States v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1991).

At issue in this case is not "insulting, and even outrageous, speech," *Boos v. Barry*, 485 U.S. 312, 322 (1988). The ADL concedes that such speech, however unpleasant, enjoys First Amendment protection. What is at stake in this case is very different.

A burning cross directed at a black family has a clear and specific meaning -- it is a palpable threat of violence, not an expression of political views. It is an act of terror and harassment. The burning cross "was not mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people." *U.S. v. Lee*, 935 F.2d 952, 956 (8th Cir. 1991).

In *Skillman*, the court noted that it was reasonable for a black family to suffer lingering effects from witnessing a cross burning in their yard, including continued fright that they might be murdered in their home. *Skillman*, 922 F.2d at 1378. Similarly, in *United States v. Salyer*, 893 F.2d 113, 114 (6th Cir. 1989), the court noted that a burning cross was more frightening than mere racial epithets shouted at a black couple. *See also State v.*

Miller, 6 Kan. App. 2d 423, 629 P.2d 748 (1981) (under circumstances, burning cross was a terroristic threat). As one commentator has stated:

> When the Klan burns a cross on the lawn of a black person who joined the NAACP or exercised his right to move to a formerly all-white neighborhood, the effect of this speech does not result from the persuasive power of an idea operating freely in the market. It is a threat, a threat made in the context of a history of lynchings, beatings, and economic reprisals that made good on earlier threats, a threat that silences a potential speaker.

Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 Duke L.Rev. 431, 471-2. It is difficult to think of another act which, although possessing some expressive content, is so clearly an act of violence.

The use of symbols charged with historical associations of hate and violence are, when directed at a specific target, capable of inflicting injury. Cross burning has been specifically recognized as having such an effect by state[4] and federal[5] courts.

---

[4] *See, e.g., State v. Reed*, No. 1006 (Tenn. Crim. App., April 18, 1985) (LEXIS, State library) (Tennessee statute, which prohibited cross burning "with the intention of intimidating another," was upheld against a First Amendment challenge); *Commonwealth of Pennsylvania v. Koch* 288 Pa. Super 290, 431 A.2d 1052 (1981) ("[t]he burning of the cross . . . to the consternation of the population of the community, is disorderly conduct"); *State v. Miller*, 6 Kan. App. 2d 432, 629 P.2d 748 (1981)(the act of burning a cross constituted a "terroristic threat" and as such could be prohibited by a Kansas statute punishing such conduct).

This Court long has recognized in a variety of contexts that the First Amendment does not protect expressive conduct which inflicts injury. *See, e.g., Ladner v. United States*, 358 U.S. 169, 176 (1958) (placing another in fear of harm is assault even when there is no actual intent to do harm); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("the legitimate state interest underlying the law of libel is the compensation for the *harm* inflicted by

---

[5] *See, e.g., U.S. v. Gresser*, 935 F.2d 96 (6th Cir. 1991) (conviction for cross burning; held to violate provisions of 42 U.S.C. § 3631(a) and 42 U.S.C. § 241 criminalizing threats or intimidation which interferes with the exercise of federally-granted rights); *U.S. v. Worthy*, 915 F.2d 1514 (11th Cir. 1990) (stipulated that cross burning was attempt to intimidate black family); *Stevens v. Tillman*, 855 F.2d 394 (7th Cir., 1988), *cert. denied*, 489 U.S. 1065 (1988) (cross burners use the threat of violence to induce targets to refrain from exercising federally assured rights). Federal courts have not hesitated to enjoin cross burning as an intimidating and harassing act. *See, e.g., Vietnamese Fishermen's Ass'n v. Knight of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982) (cross burning enjoined); *U.S. v. Crenshaw County Unit of the United Klans of Am.*, 200 F. Supp. 181 (M.D. Ala. 1968) (cross burning enjoined); *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. LA. 1965) (enjoined Ku Klux Klan from using cross burnings and other intimidating techniques to prevent blacks from exercising their right to vote, enrolling their children in predominantly white schools and other activities). Cf. Model Penal Code § 250.4(5) (1962), which prohibits certain types of harassing conduct, including "alarming conduct serving no legitimate purpose of the actor." The commentary to this subsection notes that "[t]his provision acts as a hedge against the ingenuity of human beings in finding ways to bedevil their fellows. It applies, for example, to burning a cross on the lawn of a black family ...."

defamatory falsehood") (emphasis added); *Watts v. United States*, 394 U.S. 705, 707 (1969) (true threats are not constitutionally protected speech); *United States v. Mitchell*, 463 F.2d 187, 191 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) (an unprotected threat exists if a reasonable person would foresee that the listener will believe he will be subjected to physical violence). Similarly, expressive conduct which has an injurious effect may be proscribed. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (expressive conduct which creates hostile or offensive working environment may be proscribed); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977) (expressive conduct which may destroy completely the emotional and psychological well-being of minority group workers may be proscribed); *see also* Tribe, *Constitutional Law* 856 (2d ed. 1988) ("the First Amendment need not sanctify the deliberate infliction of pain simply because the vehicle used is verbal or symbolic rather than physical").

It is clear that cross burning as it occurred in the instant case constitutes the type of violent, threatening, harassing or intimidating conduct that has never received First Amendment protection. The acts for which petitioner was charged were designed both to prevent American citizens from exercising fundamental rights and to terrorize them. Petitioner chose his form of activity; it was not a shouted epithet nor the waving of a placard or banner. It was a red-hot and searing action, pregnant with meaning to the victims, which meaning was clearly understood by both perpetrator and victims. Petitioner may not now claim that he is

being punished merely for the expression of an unpopular idea.[6]

A legislature may determine that clear, compelling and well-established public policy considerations require that such acts be criminalized, not under general assault statutes, but under statutes and ordinances designed specifically to punish and deter such acts. Criminalizing violent hate crimes serves both to protect victims and potential victims from the horrifying effects of such crimes, as well as to reassure all citizens of good will that the polity is committed to the protection of all of its citizens. In so doing, the First Amendment is not offended and free expression is not thereby chilled.

---

[6] The ADL does not suggest that the burning of a cross, in any context, would constitute unprotected speech. The ADL concedes that the use of a burning cross as, for example, in a recent video recording of a performance by the singer Madonna, called "Like a Prayer", or even the burning of a cross at a political rally as a general expression of racial hatred or racial superiority, is protected expressive conduct. No matter how unpalatable the idea, the ADL believes that the expression of such opinions are protected. In such cases, there is no act which is directed at a specific individual who, in his or her own home, cannot avoid the impact. The context makes it clear that the cross burning in this case did not represent the type of expressive conduct which is entitled to First Amendment protection.

III. The Ordinance Is Not Overbroad Since It Prohibits Only Constitutionally Unprotected Conduct

A. The Ordinance Must Be Analyzed As Construed By The Minnesota Supreme Court

When a state court construes a statute or ordinance, this Court must review any constitutional challenge to the statute or ordinance *as construed*. *Kolander v. Larson*, 461 U.S. 352, 365 (1983) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 n.5 (1982)); *Terminello v. Chicago*, 337 U.S. 1, 4 (1949) (state construction of ordinance is "a question of state law that is as binding on us as though the precise words had been written into the ordinance"). "Thus, whether a state statute actually is overbroad, whether it means what it says or something less than that, is a state law question on which state courts have the last word." Fallon, "Making Sense of Overbreadth," 100 Yale L.J. 853, 861 (1991). In considering criminal laws which punish speech or expressive conduct, this Court has consistently stressed that the constitutionality of the law is contingent upon the limiting construction, or lack thereof, employed by the lower court.[7]

---

[7] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (Court upheld constitutionality of statute as construed by state court to reach only "fighting words"); *Colten v. Kentucky*, 407 U.S. 104 (1972) (state disorderly conduct law held constitutional because, as construed by state courts, it could not punish individuals merely for expressing unpopular or annoying ideas); *Lewis v. New Orleans*, 415 U.S. 130, 132 (1974) (law unconstitutional because state court failed to construe it narrowly);

Consistent with federal and state law, the Minnesota Supreme Court narrowly construed the Ordinance to reach only conduct or speech not protected by the First Amendment. As construed, the Ordinance is limited to "fighting words and those words which tend to incite imminent lawless action." *In the Matter of R.A.V.*, 464 N.W.2d 507, 510 (citing *Chaplinsky*, 315 U.S. at 572 and *Brandenburg*, 395 U.S. at 447). The Court therefore has before it a limiting construction that is precisely in accordance with the instructions it has previously and consistently given when reviewing laws similar to the Ordinance.

The Ordinance language which Petitioner attacks as vague and overbroad--"anger, alarm or resentment" -- has been interpreted by Minnesota courts to be limited to fighting words *every time* these words have been challenged as unconstitutional. *In the Matter of R.A.V.*, 464 N.W.2d at 510 (citing *In Re S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978)); *see also City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980); *City of Minneapolis v. Lynch*, 392 N.W.2d 700 (Minn. Ct.

Gooding v. Wilson, 405 U.S. 518, 520, 524-25 (1972) (only state court is empowered to construe state laws to avoid unconstitutionality; statute unconstitutional because state appellate court failed to limit it to prohibiting "fighting words"); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (Ohio criminal syndicalism statute unconstitutional because no limiting instruction below cured constitutional defect); *see also Kelly v. Ohio*, 416 U.S. 923 (1974) (disorderly conduct statute unconstitutional because had not been limited by state court to prohibit only fighting words); *Rosen v. California*, 416 U.S. 924 (1974) (same); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (same); *Plummer v. City of Columbus*, 414 U.S. 2 (1973) (same); *Cox v. Louisiana*, 379 U.S. 536 (1965) (same).

App. 1986); *State v. Klimek*, 398 N.W.2d 41 (Minn. Ct. App. 1986). When the St. Paul City Council passed the Ordinance in 1989, the words "anger, alarm or resentment" had already been subject to such a limiting construction. Petitioner ignores this precedent when asserting that this Court must reject the Minnesota Supreme Court's interpretation of the Ordinance. Pet. Br. at 21-26.

B. The Ordinance As Construed Prohibits Only Fighting Words And Conduct Inciting Imminent Lawless Action

The Ordinance as construed may be applied only to punish unprotected conduct. It is incapable of application to protected expression and cannot therefore be considered overbroad. In evaluating an overbreadth attack, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987) (citing *Hoffman Estates v. The Flip Side, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)); *New York v. Ferber*, 458 U.S. 747, 770-71 (1982). The Minnesota Supreme Court limited the Ordinance to proscribe "fighting words" as defined by this Court in *Chaplinsky*, and conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 464 N.W.2d at 510 (quoting *Brandenburg*, 395 U.S. at 447).[8] No person would be guilty of a crime under

[8] The Minnesota Supreme Court thus did precisely what the Supreme Court of Louisiana failed to do in *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) ("Lewis II"). In Lewis II, this Court struck down a New Orleans ordinance after the Supreme Court of Louisiana failed specifically to limit the reach of such ordinance to fighting words as defined in *Chaplinsky*.

the Ordinance unless his conduct constituted fighting words or fell within the imminent lawless action doctrine enunciated in *Brandenburg*. The Ordinance therefore aims only at unprotected speech and conduct.[9]

In so narrowing the Ordinance, the Minnesota Supreme Court relied upon longstanding exceptions to the First Amendment that this Court has identified and, further, set forth tests to distinguish protected from unprotected expression that are fully consistent with well-settled First Amendment jurisprudence. To reverse this narrowing construction, the Court would have to overrule these established exceptions to the First Amendment.

The test used by the Minnesota Supreme Court to determine fighting words, "those which by their very utterance inflict injury or tend to incite immediate violence," 464 N.W.2d at 510 (citing *Chaplinsky*, 315 U.S. at 572) is taken directly from *Chaplinsky* and its progeny. This Court has been careful to note that the "fighting words" doctrine is vital and remains in essentially the same form as

[9] Petitioner's reliance on the "functional overbreadth" analysis of Professor Fallon in "Making Sense of Overbreadth," 100 Yale L.J. 853 (1991), is misplaced. The Minnesota Supreme Court did not merely conclude that the Ordinance would only punish unprotected speech but cited specific tests, i.e., those of *Chaplinsky* and *Brandenburg*, which distinguish protected from unprotected speech. According to Professor Fallon, this construction would not leave the Ordinance functionally overbroad. *Id.* at 907.

was enunciated in *Chaplinsky*.[10] Similarly, the "imminent lawless action" test set forth in *Brandenburg* has stood undisturbed by this Court. The Minnesota Supreme Court has done exactly what this Court has done every time it has considered the facial constitutionality of similar laws--set forth the *Chaplinsky* fighting words doctrine. Unless this Court is prepared to overturn this doctrine, and the line of precedent establishing it, the construction below must be upheld.

IV. The Ordinance As Construed Is Not Void For Vagueness

Petitioner asserts that the Ordinance, *even as construed*, is impermissibly vague. Pet. Br. at 30-31. Petitioner cannot attack the Ordinance as vague because the act for which he is charged--cross burning--is clearly punishable under the Ordinance. "Where the vice is vagueness, the litigant asserting the vagueness defense must demonstrate that the statute in question is vague either in all possible applications or at least as applied to the litigant's conduct, and not simply as applied to some others."

---

[10] This Court has restated the *Chaplinsky* definition of fighting words on many occasions. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989); *Karlan v. Cincinnati*, 416 U.S. 924, 927 (1974); *Gooding, 405 U.S.* at 522; *Lewis II*, 415 U.S. at 219; *Papish v. University of Missouri*, 410 U.S. 667, 676 (1973); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952); *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952); *Dennis v. United States*, 341 U.S. 494, 544 (1951); *Kunz v. New York*, 340 U.S. 290, 298 (1951); *Terminello v. Chicago*, 337 U.S. 1, 26 (1949). *See also* Shea, "Don't Bother to Smile When You Call Me That--Fighting Words and the First Amendment," 63 Kentucky L.J. 1, 10-17 (1975).

Tribe, *American Constitutional Law* 1036 (2d ed. 1988) (citing *Parker v. Levy*, 417 U.S. 733, 753-58 (1974)). Petitioner cannot sustain this burden.

Moreover, Petitioner's concern that the boundary between permissible and impermissible expression cannot be discerned is misplaced. The words "anger, alarm and resentment" have been construed by the Minnesota courts consistently over many years. *In the Matter of R.A.V.*, 464 N.W.2d 507 (Minn. 1991); *In Re S.L.J.*, 263 N.W.2d 412 (Minn. 1978); *City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980); *City of Minneapolis v. Lynch*, 392 N.W.2d 700 (Minn. Ct. App. 1986); *State v. Klimek*, 398 N.W.2d 41 (Minn. Ct. App. 1986). The Ordinance further requires that a perpetrator know or have reason to know that his act will cause the prohibited effect and that his act be based upon, *inter alia*, the race of his victim.

This Court in *Chaplinsky* stated that the New Hampshire disorderly conduct statute, *as construed*, was "narrowly drawn and limited to define and punish specific conduct. . . ." 315 U.S. at 770. This conclusion, it was held, "necessarily disposes of applicant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process." *Id.*

It strains credibility to assert that ordinary citizens would be unable reasonably to distinguish between protected speech, on the one hand, and, on the other hand, expressive conduct which is threatening, harassing, intimidating or injurious and which is directed at a victim on account of his race.

V. The Ordinance As Construed Is Consistent With Supreme Court Precedent Applying The Fighting Words Doctrine

Petitioner argues that the Ordinance, even as construed and limited by the Minnesota Supreme Court, must be declared unconstitutional because of the manner in which it *might* be applied below. Because this case involves a facial challenge to the Ordinance, these arguments are premature; since possible attempts to apply the Ordinance are inherently speculative, they cannot provide the basis for overturning a limiting construction that is in accordance with established First Amendment jurisprudence. Should this Court choose to address these issues, however, what follows is a discussion on how the application of this Ordinance as construed would be constitutional.

The Minnesota Supreme Court was careful to point out that the Ordinance does *not* assume that "any cross burning, irrespective of the context in which it occurs, is subject to prosecution." 464 N.W.2d at 510. Rather, the Ordinance as construed will reach only those cross burnings--or similar use of other symbols charged with violence and terror--which are "expressions of hatred and resort to bias-motivated personal abuse that the First Amendment does not protect." *Id.* at 511.

So construed, the Ordinance does not concern itself with the mere "offensive" nature of the burning cross. Similarly, the Ordinance does not prohibit the use of any symbol, including a burning cross or a swastika, to express one's viewpoint, even if that viewpoint is one of racial bias. The Ordinance proscribes only uses which are "personally abusive."

So long as symbols are used to express a general viewpoint, no matter how offensive that viewpoint, the Ordinance simply does not apply. The Minnesota Supreme Court clearly recognized that St. Paul may not proscribe the use of symbols merely because they express an unpopular or "offensive" opinion. Rather, it is the injurious nature of the burning cross in certain contexts--reasonably understood by the target to be a personal message of terror, intimidation and threat--which is proscribed.

The fighting words doctrine is not, as Petitioner asserts, limited strictly to "words that would provoke an average addressee to fight." *Chaplinsky*, 315 U.S. at 573. The definition also encompasses "words that by their very utterance inflict injury." *Id.* at 572. The "inflict injury" language has never been rejected by this Court, and indeed it is well suited to punish precisely the type of conduct that is at issue in this case.

Proper application of this language would not undermine the laudable goal of the First Amendment--to foster the free flow of ideas in a democratic society. "Vulgar, offensive and shocking" expressions that are protected by the First Amendment would not be at risk, *see Cohen*, 403 U.S. at 20; *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 745-47 (1978), but only conduct which, despite having some expressive content, inflicts direct injury:

> The negative effects of hate messages are real and immediate for the victim. Victims of vicious hate propaganda have experienced psychological symptoms and emotional distress

> ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide.

Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 Mich. L. Rev. 2320, 2336 (1989); *see also Cantwell v. Connecticut*, 310 U.S. 296, 307-310 (1940) ("Resort to epithets or personal abuse . . . is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act [raises] no question under that instrument.") These are expressions that, as this Court recognized in *Chaplinsky* and has reaffirmed continually thereafter, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 315 U.S. at 572.

However, this Court is not now required to pass on the validity of the "inflict injury" language in the *Chaplinsky* definition because it has not been applied to R.A.V.'s conduct. At present, the Minnesota Supreme Court has merely done what this Court has done every time it addresses an issue of fighting words, i.e., set forth the *Chaplinsky* definition. Subsequent application of this doctrine to R.A.V.'s conduct is inherently speculative. The court below may find that R.A.V.'s acts either were likely to provoke the victim to fight, or that such acts inflicted injury, or both, or neither. Regardless, speculation as to application of the Ordinance cannot be the basis for invalidating a limiting

construction that is entirely consistent with well-settled state and federal precedent.[11]

Furthermore, the fact that the Ordinance specifically lists a burning cross and a swastika as examples of punishable symbols is not constitutionally significant. Their listing does not, as suggested by Petitioner, impose a state-sponsored prohibition of racial intolerance. Pet. Br. at 16-17. Rather, their listing simply reflects a legislative recognition of the symbols' association with violence and threats of violence, and the potential for resulting injury.

Similarly, the fact that the Ordinance makes reference both to public and private property is not of any constitutional significance. As limited by the Minnesota court, only personal attacks and threats are proscribed. Clearly, as the use of a symbol becomes more public and the target audience more generalized, the less likely it becomes that any specific person may reasonably interpret that symbol as a personal attack or threat. The conduct proscribed by the Ordinance is a crime against a *person*, not against property. As with other personal attacks, such as common assault, the location of the crime, while important in evaluating the facts, does not in itself change the nature of the attack and the resulting injury.

---

[11] Moreover, even if this Court were to limit the definition of fighting words to exclude the "inflict injury" language, this case should be remanded to the Minnesota Supreme Court, as was done in *Lewis*, 408 U.S. 913 (1972), to reconsider its articulation of this doctrine.

The distinction between public expressions of offensive ideas and hate-motivated expressive conduct targeted at a specific individual is critical to distinguishing the conduct prohibited by the Ordinance from protected speech. The two recent flag burning cases make the distinction clear. In *Texas v. Johnson*, 491 U.S. 397 (1989), this Court considered the criminal conviction under a flag desecration statute of a protester who burned an American flag on the steps of the Dallas City Hall. The flag burning was in apparent opposition to the United States in general, to the Republican Party, or both. In holding that the flag burning was protected speech under the First Amendment, this Court specifically held that, based on the record of the case, the flag burning did not threaten social disorder or injury.[12] Given the general message expressed by Johnson's conduct and the forum in which it occurred, the Court concluded that "no reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." Id. at 409; *accord Cohen v. California*, 403 U.S. 15 (1971) (conviction of person who displayed phrase "F..k the Draft" on his jacket overturned; "no individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult"). Significantly, the

---

[12] This Court repeatedly noted the lack of any evidence that a breach of the peace or physical injury was threatened. "No one was physically injured or threatened with injury," 491 U.S. at 399; "[the State] fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct," Id. at 408; "State's interest in maintaining order is not implicated on these facts," Id. at 410.

Court in *Johnson did not* hold the Texas statute at issue unconstitutional on its face.

Similarly, in *Eichman v. United States*, 496 U.S. ___, 110 S. Ct. 2404 (1990), the Supreme Court considered the criminal conviction, under the federal Flag Protection Act of 1989, of two sets of protestors: a group that set burned flags on the steps of the United States Capitol in protest of certain federal domestic and foreign policies, and a group that set a flag on fire in protest of the Flag Protection Act (the location of the protest is not specified). Citing *Texas v. Johnson*, this Court simply chose not to reconsider its holding that flag burning enjoyed protection under the First Amendment.

Notably, both in *Texas v. Johnson* and in *Eichman v. United States*, the flag burning occurred in a public place, and the message communicated by the flag burning was directed not at specific individuals, but at the Federal Government or a political party. These cases stand only for the proposition that public flag burning as a means of political expression is protected by the First Amendment. Neither case supports the proposition that a person may burn an object at any place at any time simply because the burning is expressive conduct. They certainly do not suggest that the First Amendment protects the burning of a cross on private property to threaten, intimidate, harass or

terrorize a specific victim.[13]

---

[13] The same analysis holds true in the Skokie, Illinois Nazi march cases. While holding that the expressive content of the public march could not be prohibited under the First Amendment, the Seventh Circuit proceeded to state:

> There is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure.

Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). Similarly, the Illinois Supreme Court held that the Nazis had a constitutional right to conduct the march, noting that the planned march had become common knowledge, that there was ample forewarning of its potentially offensive content, and that, therefore, a person could avoid a confrontation with the march. Once again, however, the Court reaffirmed that expressive conduct was not similarly protected when imposed on the privacy of one's home or on a captive audience. *Village of Skokie v. National Socialist Party of America*, 69 Ill. App. 2d 605, 612, 373 N.E.2d 21 (1978)373 N.E. 2d 21, 26 (1978). Unlike the situation in Skokie, the victims in the instant case could not ignore the distasteful conduct, nor could they choose to absent themselves from the site at which the act was committed. In their homes, in what should have been a preserve of peace and security, they could not avoid the attack. They were not observers or onlookers, they were truly victims. *See also Boos v. Barry*, 485 U.S. 312 (1988) (Court held portion of a federal statute unconstitutional, but approved another federal statute which prohibited willful acts or attempts to "intimidate, coerce, threaten, or harass").

CONCLUSION

The burning of a cross in the private yard of a black family in an all-white neighborhood is a vicious act which threatens, harasses and intimidates. St. Paul Ordinance § 292.02, as construed by the Minnesota Supreme Court, is a constitutionally acceptable way of criminalizing such behavior. The Ordinance prohibits only conduct which constitutes fighting words or which incites imminent lawless action. As so construed, the Ordinance is neither overbroad nor vague: it does not reach constitutionally protected speech and it gives clear notice as to what is prohibited. For these reasons, the decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

Allen I. Saeks
Counsel of Record
Mark S. Weitz
Timothy R. Meyerson
Lawrence P. Schaefer
Leonard, Street and Deinard
150 South Fifth Street
Minneapolis, MN 55402
(612) 335-1500
Counsel for Anti-Defamation League of B'nai B'rith as Amicus Curiae

Of Counsel
Ruth L. Lansner
Jeffrey P. Sinensky
Stephen M. Freeman
Michael A. Sandberg
Michael Lieberman
Tamar Sadeh Ellison
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, New York 10017
(212) 490-2525

APPENDIX A

Alabama
Ala. Code § 13A-11-12 (1988)

Arizona
Ariz. Rev. Stat. Ann. §§ 13-1504 and -1604 (West 1989)

Arkansas
Ark. Stat. Ann. §§ 5-71-207 and -215 (1987)

California
Cal. Penal Code § 190.2(a)(16)(West Supp. 1991); Cal. Penal Code § 302 (West 1988 and Supp. 1991); Cal. Penal Code §§ 422.6 and .7 (West 1988); Cal. Penal Code §§ 594 and 594.3 (West 1988); Cal. Penal Code § 1170.8 (West 1985); Cal. Penal Code §§ 11410-11413 (West 1988 & Supp. 1991)

Colorado
Colo. Rev. Stat. §§ 18-9-113 and -121 (West 1990 & Supp. 1991)

Connecticut
Conn. Gen. Stat. Ann. § 46a-58 (West 1986); Conn. Gen. Stat. Ann. § 52-251b (West Supp. 1991); Conn. Gen. Stat. Ann. § 53-37a (West 1987); Conn. Gen. Stat. Ann. §§ 53a -400, and -181b (West 1988 & Supp. 1991); Connecticut Data Collection Statute: Committee Bill No. 5993 (1988)

Delaware
Del. Code Ann. tit. 11, § 1331 (1987)

District of Columbia
D.C. Code Ann. § 22-1114, 3112.2-3112.4 (1989); D.C. Code Ann § 4001-4004 (Supp. 1991)

Florida
Fla. Stat. Ann. § 806.13 (West 1976 & Supp. 1991); Fla. Stat. Ann § 871.01-.03 (West 1975 and Supp. 1991); Fla. Stat. Ann. § 876.17 to .19 (West 1976 and 1991 Supp.); Fla. Stat. Ann. § 877.19 (West 1976 & Supp. 1991); Fla. Stat. Ann. §§ 775.0845 and .085 (West 1976 & Supp. 1991)

Georgia
Ga. Code Ann. § 16-7-26 (Harrison 1982); Ga. Code Ann. §§ 16-11-37 to -38 (1988)

Hawaii
Haw. Rev. Stat. § 711-1107 (1988)

Idaho
Idaho Code §§ 18-6201 and -7901 to -7904 (1987); Idaho Code § 67-2905 (1989)

Illinois
Ill. Ann. Stat. ch. 38, ¶¶ 12-2(2) and 21-1.2 (Smith-Hurd Supp. 1991); Ill Ann. Stat. ch. 38, para. 1005-5-3.2 (Smith-Hurd 1982 and Supp. 1991) Ill. Ann. Stat. ch. 127, ¶ 55a (Smith-Hurd Supp. 1991)

Indiana
Ind. Code Ann. § 35-43-1-2 (West 1986 & Supp. 1987)

Iowa
Iowa Code Ann. § 729.5 (West 1991 & Supp. 1991)

Kansas
Kan. Stat. Ann. § 21-4111 (1988)

Kentucky
Ky. Rev. Stat. Ann. § 525.110 (Michie 1990)

Louisiana
La. Rev. Stat. Ann. §§ 9:2799.2, 14:225 and 14:313 (West 1986 & Supp. 1991)

Maine
Me. Rev. Stat. Ann. tit. 17-A, §§ 507 and 507-A (West 1983 & Supp. 1990)

Maryland
Md. Ann. Code art. 88B, §§ 9 and 10 (1985 and Supp. 1990); Md. Ann. Code art. 27, §§ 10A and 470A (1988 and Supp. 1990)

Massachusetts
Mass. Ann. Laws ch. 6, § 116B (Law. Co-op Supp. 1991); Mass. Ann. Laws ch. 22, §§ 16 to 19 (Law. Co-op Supp. 1991); Mass. Ann. Laws ch. 265, § 39 (Law. Co-op Supp. 1991); Mass Ann. Laws ch. 266, § 98 (Law. Co-op 1980); Mass. Ann. Laws ch. 266, §§ 127A and 128B (Law. Co-op. Supp. 1991); Mass. Ann. Laws ch. 272, § 38 (Law. Co-op 1980);

Michigan
Mich. Comp. Laws Ann. § 752.525 (West 1991); Mich. Comp. Laws Ann. §§ 750.147(b), .217 and .396 (West 1991)

Minnesota
Minn. Stat. Ann. § 609.2231, .28, .595, .605, .735 and .795 (West Supp. 1991); Minn. Stat. Ann. § 626.5531 (West Supp. 1991)

Mississippi
Miss. Code Ann. §§ 97-17-39 and -35-17 (1973 & Supp. 1990)

Missouri
Mo. Ann. Stat. § 79.450 (Vernon 1987); Mo. Ann. Stat. §§ 574.085, .090 and .093 (Vernon Supp. 1991)

Montana
Mont. Code Ann. §§ 45-5-221 to -222 (1989)

Nevada
Nev. Rev. Stat. Ann. § 83.130 (Michie 1991); Nev. Rev. Stat. Ann. § 201.270 (Michie 1986); Nev. Rev. Stat. Ann. § 206.125 (Michie Supp. 1989); Nev. Rev. Stat. Ann. § 207.185 (Michie Supp. 1989)

New Hampshire
N.H. Rev. Stat. Ann. § 651.6 (1986 & Supp. 1990)

New Jersey
N.J. Stat. Ann. § 2C:12-1 (West 1982 & Supp. 1991); N.J. Stat. Ann § 2C:43-7 (West 1982 & Supp. 1991); N.J. Stat. Ann. § 2C:44-3 (West 1982 & Supp. 1991); N.J. Stat. Ann. § 2C:33-4 and -9 to -11 (West 1982 and Supp. 1991);

New Mexico
N.M. Stat. Ann. § 30-13-1 and -15-4 (1984)

New York
N.Y. Penal Law §§ 240.21, .30 and .31 (McKinney 1989); N.Y. Penal Law § 155.30(9) (McKinney Supp. 1991); N.Y. Penal Law § 165.45(6) (McKinney Supp. 1991); N.Y. Civ. Rights Law §§ 40-c to -d (McKinney Supp. 1991)

North Carolina
N.C. Gen. Stat. §§ 14-12.12 to -12.15, -144, -199 and -200 (1986)

North Dakota
N.D. Cent. Code §§ 12.1-14-04 to -05 (1985 & Supp. 1989)

Ohio
Ohio Rev. Code Ann. § 2909.05 (Baldwin 1990); Ohio Rev. Code Ann. §§ 2927.11 to .12 (Baldwin 1990)

Oklahoma
Okla. Stat. Ann. tit. 21, § 850 (West 1991); Okla Stat. Ann. tit. 21, §§ 914, 915, 1765 and 1301 to 1303 (West 1983)

Oregon
Or. Rev. Stat. §§ 30.190 and .200 (1988); Or. Rev. Stat. §§ 166.075, .155, and .165 (1990); Or. Rev. Stat. § 181.550 (1991)

Pennsylvania
18 Pa. Cons. Stat. Ann. §§ 2710, 3307 and 5509 (Purdon 1983 & Supp. 1991); 71 Pa. Cons. Stat. Ann. §§ 250(i) and 251 (Purdon 1990)

Rhode Island
R.I. Gen. Laws § 9-1-35 (1985); R.I. Gen. Laws §§ 11-11-1; R.I. Gen. Laws §§ 11-42-3, -44-31, -53-1, and -53-2 (1981 and Supp. 1990); R.I. Gen. Laws § 42-28-46 (1988)

South Carolina
S.C. Code Ann. §§ 16-7-110, -7-120 and -17-520 (Law. Co-op. 1985)

South Dakota
S.D. Codified Laws Ann. § 22-27-1 (1988)

Tennessee
Tenn. Code Ann. §§ 39-17-309, -311 and -313 (Supp. 1989)

Texas
Tex. Penal Code Ann. § 42.09 (Vernon 1974 & Supp. 1990); Tex. Penal Code Ann. § 28.03 (Vernon Supp. 1990)

Vermont
Vt. Stat. Ann. tit. 13, §§ 1454-1457 (Supp. 1990)

Virginia
Va. Code Ann. § 8.01-42.1 (1984 & Supp. 1990); Va. Code Ann. §§ 18.2-127, -138, -415, -422, -423 and 423.1 (1988 & Supp. 1991); Va. Code Ann. § 52-8.5 (1988)

Washington
Wash. Rev. Code Ann. § 9A.36.080 (1988 and Supp. 1991); Wash. Rev. Code Ann. §§ 9.61.160 and 180 (1988 and Supp. 1991);

West Virginia
W. Va. Code § 61-6-13, -21 and -22 (1989)

Wisconsin
Wis. Stat. Ann. § 895.75 (West 1983 & Supp. 1990); Wis. Stat. Ann. §§ 939.641 and .645 (West 1982 &

Supp. 1990); Wis. Stat. Ann. 943.012 (West 1982 & Supp. 1990)

United States
Federal Religious Vandalism Act, 18 U.S.C.A. § 247 (West Supp. 1989)
Federal Hate Crime Statistics Act, Pub. L. No. 101-275 (1990)

APPENDIX B

California
Cal. Penal Code § 11411 (West Supp. 1991)

Connecticut
Conn. Gen. Stat. Ann. § 46a-58 (West 1986)

District of Columbia
D.C. Code Ann. § 22-3112.2 (1989)

Florida
Fla. Stat. Ann. § 876.17 (West 1976)

Georgia
Ga. Code Ann. § 16-11-37 (1988)

Iowa
Iowa Code Ann. § 729.5.4 (West 1991)

Maryland
(Md. Ann. Code art. 27, § 10A (1988)

Montana
Mont. Code Ann. § 45-5-221.2 (1989)

New Jersey
N.J. Stat. Ann. § 2C: 33-10 (West 1982)

North Carolina
N.C. Gen. Stat. § 14-12.12 (1986)

Rhode Island
R.I. Gen. Laws § 11-53-2 (1982)

South Carolina
S.C. Code Ann. § 16-7-120 (Law. Co-op. 1985)

Tennessee
Tenn. Code Ann. 39-17-313.3(c) (Supp. 1989)

Vermont
Vt. Stat. Ann. Tit. 13, § 546 (Supp. 1990)

Virginia
Va. Code Ann. § 18.2-423 (1988 & Supp. 1990)

Washington
Wash. Rev. Code § 9A.36.080.2(a) (Supp. 1991).

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

In The

Supreme Court of the United States

OCTOBER TERM, 1990

R.A.V., *Petitioner,*

v.

ST. PAUL, MINNESOTA, *Respondent.*

REPRINTED COPY

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, THE ASIAN PACIFIC AMERICAN LEGAL CENTER, AND THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ANGELO N. ANCHETA*
KATHRYN K. IMAHARA
ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA
1010 South Flower Street, Suite 302
Los Angeles, California 90015
(213) 748-2022

KAREN K. NARASAKI
NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION
PERKINS COIE
1201 Third Avenue, 40th Floor
Seattle, Washington 98101

DENNIS HAYASHI
DOREENA WONG
ASIAN LAW CAUCUS, INC.
468 Bush Street, 3rd Floor
San Francisco, California 94108

STANLEY MARK
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, New York 10013

** Counsel of Record*

RECEIVED
SEP 5 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BEST AVAILABLE COPY

37 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. PREVENTING RACIALLY MOTIVATED VIOLENCE, HARASSMENT, AND INTIMIDATION IS A COMPELLING GOVERNMENTAL INTEREST 6

A. Racially Motivated Violence Against Asians, Pacific Islanders, and Other People of Color is a Serious and Pervasive Problem 6

B. Racially Motivated Crimes Have Been Properly Addressed Through Statutes Prohibiting Such Conduct 10

II. THE ST. PAUL HATE CRIMES ORDINANCE, AS CONSTRUED BY THE MINNESOTA SUPREME COURT, IS CONSTITUTIONAL 12

A. The Minnesota Supreme Court Properly Narrowed the Scope of the St. Paul Ordinance to Include Only Unprotected Expression 14

B. The St. Paul Ordinance Applies to Unprotected Expression -- Conduct That is Violent or Causes Violence 17

CONCLUSION 23

APPENDIX A A-1

APPENDIX B A-3

TABLE OF AUTHORITIES

Page

CASES:

Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 14

Brandenburg v. Ohio, 395 U.S. 444 (1969) . 15, 17, 18

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 14

Cantwell v. Connecticut, 310 U.S. 296 (1940) 18

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) . 15, 17, 18

City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980) 16

City of Minneapolis v. Lynch, 392 N.W.2d 700 (Minn. Ct. App. 1986) 16

Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) 21

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) . . 17

Gooding v. Wilson, 405 U.S. 518 (1972) 15, 16

In re *Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1990) 14, 15

In re *Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978) 16

Karlan v. City of Cincinnati, 416 U.S. 924 (1974) . . 15

Kelly v. Ohio, 416 U.S. 923 (1974) 15

Kolender v. Lawson, 461 U.S. 352 (1983) 22

Korematsu v. United States, 323 U.S. 214 (1944) 7

Lewis v. City of New Orleans, 415 U.S. 130 (1974) . 15

Lucas v. Arkansas, 416 U.S. 919 (1974) 15

New York v. Ferber, 458 U.S. 747 (1982) . . 14, 16, 17

Osborne v. Ohio, 110 S. Ct. 1691 (1990) 14, 15

Page

Ozawa v. United States, 260 U.S. 178 (1922) 7

People v. Hall, 4 Cal. 399 (1854) 7

Rosen v. California, 416 U.S. 924 (1974) 15

Roth v. United States, 354 U.S. 476 (1957) 17

State v. Miller, 260 Ga. 669, 398 S.E.2d 547 (1990) . 21

State v. Miller, 629 P.2d 748 (Kan. Ct. App. 1981) . 21

Texas v. Johnson, 491 U.S. 397 (1989) 21, 22

United States v. Eichman, 110 S. Ct. 2404 (1990) . . 21

United States v. Lee, 935 F.2d 952 (8th Cir. 1991) 19, 21

United States v. Salyer, 893 F.2d 113 (6th Cir. 1989) 21

Wainwright v. Stone, 414 U.S. 21 (1973) 16

Watts v. United States, 394 U.S. 705 (1969) 19

CONSTITUTION, STATUTES, AND ORDINANCES:

Cal. Penal Code § 11411 (West Supp. 1991) 11

Chinese Exclusion Act, Ch. 126, 22 Stat. 58 (1882) . . 7

Executive Order 9066, 3 C.F.R. 1092 (1938-43) 7

Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) 10

Minn. Stat. § 609.2231, subd. 4(a) (West Supp. 1991) 13

St. Paul, Minn., Legis. Code § 292.01 (1990) 13

St. Paul, Minn., Legis. Code § 292.02 (1990) . . . *passim*

St. Paul, Minn., Legis. Code § 292.03 (1990) 13

Tydings-McDuffie Act, Ch. 84, 48 Stat. 456 (1934) . . 7

U.S. Const. amend. I . . . . . *passim*

Page

MISCELLANEOUS:

Albuquerque J., June 6, 1991, § D, at 1. 7

Anti-Asian Violence at Cornell University, World J., June 15, 1991, at 3 10

Arizona Republic, Nov. 5, 1990, at B1 10

Asian Week, Apr. 5, 1991, at 1 8

Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) 19

Gard, *Fighting Words and Free Speech*, 58 Wash. U.L.Q. 531 (1980) 19

Houston Chronicle, Jan. 19, 1991, § A, at 29 9

L. Tribe, *American Constitutional Law* (2d ed. 1988) 18

L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County, 1990* (1991) 8

Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation, 37 Buffalo L. Rev. 337 (1989) 18

Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 17

Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) 17, 19

Minn. Advisory Comm. to U.S. Comm'n on Civil Rights, *Bigotry and Violence in Minnesota* (1989) 11

Phoenix Gazette, Sept. 14, 1990, § B, at 1 9

Race on Campus: Failing the Test?, Newsweek, May 6, 1991, at 26 10

Page

Southern Poverty Law Center, *Asians in America: Old Stereotypes, Renewed Violence Confront the Country's Fastest Growing Ethnic Population*, Klanwatch Intelligence Rep. No. 50 (June 1990) 7, 9

Southern Poverty Law Center, *The Ku Klux Klan: A History of Racism and Violence* (3d ed. 1988) . . . 20

U.S. Comm'n on Civil Rights, *Recent Activities Against Citizens and Residents of Asian Descent* (Clearinghouse Pub. No. 88, 1986) 7, 8

U.S. Comm'n on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* (Clearinghouse Pub. No. 96, 1990) 6, 11, 20

U.S. Dep't of Commerce, Bureau of the Census, *United States (National) 1990 Census Counts [General Population]* (1991) 7

In The

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-7675

R.A.V., *Petitioner,*

v.

ST. PAUL, MINNESOTA, *Respondent.*

On Writ of Certiorari to the
Supreme Court of Minnesota

BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, THE ASIAN PACIFIC AMERICAN LEGAL CENTER, AND THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Asian American Legal Defense and Education Fund, the Asian Law Caucus, Inc., the Asian Pacific American Legal Center of Southern California, and the National Asian Pacific American Bar Association submit this brief as *amici curiae* in support of respondent, the City of St. Paul, Minnesota. Counsel for both parties have consented to the submission of this brief; letters

of consent have been filed with the Clerk of the Court.

The four *amici curiae* are organizations dedicated to the protection of civil rights for the Asian and Pacific Islander communities in the United States. All four *amici* have advocated for the passage of hate crimes legislation, and are active members of the National Network Against Anti-Asian Violence, a coalition of organizations that monitor and respond to incidents of hate violence throughout the country.

Founded in 1974, the Asian American Legal Defense and Education Fund (AALDEF) is a civil rights organization that addresses critical issues facing Asian Pacific Americans through community education, advocacy, and litigation. AALDEF's program priorities include the elimination of anti-Asian violence, immigrant rights, voting rights, employment and labor rights, and redress for Japanese Americans who were incarcerated in camps within the United States during World War II.

The Asian Law Caucus, Inc. (ALC) is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities. Since 1972, the ALC has provided free to low-cost multilingual legal services and community education in the areas of immigration, housing, employment and labor, and civil rights. In recognition of the growing problem of anti-Asian violence, the ALC established the Hate Violence Project, a comprehensive program that assists victims of hate crimes and seeks to reduce the incidence of such crimes in the Asian community through legal assistance, education, and advocacy.

The Asian Pacific American Legal Center of Southern California (APALC) is a nonprofit legal organization dedicated to serving the Asian and Pacific Islander communities through direct legal services, community education, leadership development, and advocacy. Founded in 1983, the APALC provides multilingual, culturally sensitive legal and

educational services, with programs focusing on immigration, family law, language rights, interethnic relations, dispute resolution, and civil rights advocacy.

Together, AALDEF, ALC, and APALC constitute the National Asian Pacific American Legal Consortium, an organization whose mission is to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities through collaborative efforts and the formation of a national legal structure that pursues litigation, advocacy, education, and public policy development.

The National Asian Pacific American Bar Association (NAPABA) is a nationwide, nonprofit, nonpartisan organization of Asian Pacific American attorneys. Founded in 1989, NAPABA has over 2500 members and is dedicated to serving the needs of Asian Pacific American attorneys and their communities. Since its inception, stemming the rising tide of racial violence, particularly anti-Asian violence, has been one of NAPABA's top priorities. It has produced educational materials on racial violence and its members have testified on behalf of hate crimes legislation and have been available as a resource to victims, families of victims, and communities affected by incidents of hate crimes.

This case raises issues of significant concern to *amici* and the individuals they represent. While *amici* are vigorous defenders of civil liberties, including freedom of speech, *amici* believe that legislative efforts such as the St. Paul ordinance are necessary in the fight to deter racial and religious violence. Expression that exceeds offensiveness and mere unpopularity, but which in itself constitutes a violent act and has the immediate potential to incite others to commit violence, is simply not protected speech.

SUMMARY OF ARGUMENT

Because of the traumatic effects that acts of racial violence have on both victims and the communities in which they live, and because of the long history of racial discrimination in the United States, there is a compelling governmental interest in eliminating racial violence. Although cross burning is usually identified with violence against African Americans, other people of color have been subjected to similar acts of intimidation. Within recent years, several incidents of cross burnings targeted against Asians and Pacific Islanders have been reported across the nation.

With the dramatic growth of the Asian and Pacific Islander populations in the United States has come the sobering reality that hate crimes against these communities have increased as well. Throughout the country, reports of hate crimes against Asians and Pacific Islanders have risen at a rate faster than any other ethnic group. This violence has covered the gamut of cross burnings, racial slurs, graffiti, vandalism, beatings, shootings, and killings. The violence has not been limited to individuals and their homes, and has included places of religious worship, businesses, and even college campuses.

In response to the proliferation of racial violence, legislatures at the local, state, and federal levels have enacted laws that monitor hate crimes and prohibit specific acts of violence. A common legislative scheme is one that outlaws cross burnings and other forms of intimidation or harassment. Hate crimes laws send a clear message that racial violence is intolerable and that all citizens and residents must be free from intimidation and hatred. Protecting all members of society from violence is thus a compelling state interest and must be the impetus for enacting and upholding statutes that address hate crimes.

The City of St. Paul, Minnesota has recognized the problem of racial and religious violence and has enacted hate

crimes legislation to address the problem. St. Paul's bias-motivated disorderly conduct statute was enacted precisely to punish the conduct of which the petitioner has been accused: burning a cross on the lawn of a person of color.

Petitioner contends that the ordinance is overbroad. However, overbreadth is not fatal when the statute has been narrowed to include only conduct that is clearly outside the scope of constitutional protection. In this case, the Minnesota Supreme Court has narrowed the statute to reach only conduct falling into categories outside first amendment protection: (1) "fighting words" and (2) incitement.

Cross burning is an especially invidious act. A burning cross is an insult and a threat; it carries with it the historical baggage of past terrorism and physical attacks. When a cross burning is targeted against an individual and his family, it is more than just expression; it is a form of violence itself -- symbolic violence.

Because context determines whether symbolic conduct rises to the level of fighting words or incitement, many instances of symbolic conduct fall outside the scope of the ordinance. When examined in context, cross burning can be distinguished from protected conduct such as flag burning. This Court has recognized that flag burning is protected by the first amendment because of the context in which occurs -- people dissenting from conventional political thought. Cross burning directed against a specific person, on the other hand, conveys an unambiguous message of hatred and intimidation.

As interpreted by the state supreme court, the St. Paul ordinance has been narrowed to proscribe conduct that is unprotected by the first amendment. The ordinance punishes conduct that amounts to symbolic violence which in turn threatens further violence. The St. Paul disorderly conduct ordinance is constitutional, and the decision of the Supreme Court of Minnesota should be affirmed.

ARGUMENT

I. PREVENTING RACIALLY MOTIVATED VIOLENCE, HARASSMENT, AND INTIMIDATION IS A COMPELLING GOVERNMENTAL INTEREST

The United States has a long history of prejudice and discrimination against people of color. And for much of this history, prejudice and discrimination have produced violence. No one can represent in good faith to this Court that racially motivated violence, harassment, and intimidation do not have profoundly traumatic effects on the intended victims and on the community at large. Thus, there is a compelling governmental interest in addressing the growing problem of racially motivated violence.

A. Racially Motivated Violence Against Asians, Pacific Islanders, and Other People of Color is a Serious and Pervasive Problem

The history of minority groups in this country is replete with overt racism and hostility that have been fanned into individual and mob violence. *See* U.S. Comm'n on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* (Clearinghouse Pub. No. 96, 1990) [hereinafter *Intimidation and Violence*]. Symbols such as a burning cross have a long association with racial and religious violence, either as assaults in themselves, or as tools to inflame racial and religious bigotry and to incite violence. *See id.* at 13. The symbolism in our nation's history goes far beyond an invitation to debate offensive notions and results in more than wounded emotions or "hurt feelings."

Cross burnings, while best known as an assault tactic by the Ku Klux Klan against African Americans, have also been used against other "unpopular" groups such as Asians and Pacific Islanders. As recently as June 4, 1991, a Filipino American family in Albuquerque, New Mexico, was terror-

ized by a cross burning in their yard.[1] *See* Albuquerque J., June 6, 1991, § D, at 1.

As in the past, population growth and overt discrimination[2] against Asians and Pacific Islanders have resulted in the proliferation of anti-Asian violence.[3] *See* U.S. Comm'n on Civil Rights, *Recent Activities Against Citizens and Residents of Asian Descent* (Clearinghouse Pub. No. 88, 1986) [hereinafter *Recent Activities*]. According to the 1990 census, there are close to 7.3 million Asians and Pacific Islanders in the United States, representing an increase of 107.8% from the 1980 census, and making this community one of the fastest growing groups in the United States. U.S. Dep't of Commerce, Bureau of the Census, *United States*

---

[1]Recent cross burnings targeted against Asians include incidents at the home of several Hmong refugees in California, against a Chinese family in California, and against a Japanese school in Tennessee. *See* Southern Poverty Law Center, *Asians in America: Old Stereotypes, Renewed Violence Confront the Country's Fastest Growing Ethnic Population*, Klanwatch Intelligence Rep. No. 50, at 5 (June 1990).

[2]Past governmental discrimination against Asians and Pacific Islanders has ranged from anti-Asian court decisions, *see, e.g., People v. Hall*, 4 Cal. 399 (1854) (Chinese and other non-white people prohibited against testifying against whites); *Ozawa v. United States*, 260 U.S. 178 (1922) (Japanese forbidden from obtaining American citizenship), to exclusionary immigration laws, *see, e.g.*, Chinese Exclusion Act, Ch. 126, 22 Stat. 58 (1882); Tydings-McDuffie Act, Ch. 84, 48 Stat. 456 (1934) (limiting Filipino immigration to quota of fifty per year), to the forced incarceration of Japanese Americans during World War II, *see* Executive Order 9066, 3 C.F.R. 1092 (1938-43); *see also Korematsu v. United States*, 323 U.S. 214 (1944).

[3]The increase in anti-Asian sentiment can also be attributed to increasing economic hardship faced by many communities, coupled with severe cutbacks in government social service programs, the fear of economic competition from Pacific Rim countries, and the United States' past participation in wars on Asian soil. *See Recent Activities*, *supra*, at 29-39.

(National) 1990 Census Counts [General Population], at 1, Table 1 (1991).

Anti-Asian violence has grown concomitantly with the increase in the population. In Los Angeles County, for example, there was a sixty-five percent increase in the total number of racially motivated hate crimes from 1989 to 1990. L.A. County Comm'n on Human Relations, *Hate Crime in Los Angeles County, 1990*, at 1-2 (1991). Out of a total of 275 racially motivated hate crimes, forty-nine, or 17.8 percent, were directed at Asians and Pacific Islanders. *Id.*

Similarly, the number of hate crimes has increased in other major metropolitan areas where Asians and Pacific Islanders are concentrated. Between January and August of 1990 in New York City, reported incidents against Asian Pacific Americans showed the highest increase among all the ethnic groups. *See* Asian Week, Apr. 5, 1991, at 1. In Boston, Massachusetts, there was a sixty percent increase in reported anti-Asian violence in from 1982 to 1987. *Id.* Moreover, reported numbers no doubt undercount the number of incidents, given the fact that a large portion of the Asian and Pacific Islander population are immigrants and may be reluctant to report the incidents because of fear, language difficulties, and ignorance of their legal rights.

Violence against Asians and Pacific Islanders has covered the gamut of cross burnings, racial slurs, graffiti, beatings, shootings, and killings.[4] For example, in 1982, Vincent Chin, a Chinese American, was beaten to death by two white unemployed auto workers in Detroit, Michigan who blamed Chin for the influx of Japanese automobiles and the loss of their jobs. *See Recent Activities*, *supra* p. 7, at 43-44.

In 1989, gunman Patrick Purdy, who hated Vietnamese people as a result of the Vietnam War, killed five and

[4]*See* Appendix A.

wounded more than twenty Southeast Asian children with his assault rifle in Stockton, California. Also in 1989, in Raleigh, North Carolina, Ming Hai "Jim" Loo, a Chinese American, was beaten to death outside of a pool hall by white men who blamed him for the death of Americans in Vietnam. *See* Southern Poverty Law Center, *Asians in America: Old Stereotypes, Renewed Violence Confront the Country's Fastest Growing Ethnic Population*, Klanwatch Intelligence Rep. No. 50, at 4 (June 1990).

In 1990, a fifteen-year-old Vietnamese teenager, Hung Truong, was beaten to death by two white high school boys who associated with an organized hate group known as "skinheads" in Houston, Texas. While being beaten and kicked, the boy apparently pleaded for his life and said, "God forgive me for coming to this country. I'm so sorry." *See* Houston Chronicle, Jan. 19, 1991, § A, at 29.

Even if there are no immediate physical injuries, acts of racial intimidation, such as cross burnings, serve to terrorize Asians and Pacific Islanders and interfere with their basic, fundamental right to live without being subject to violence or fear of violence solely because of their race.

In the recent past, intimidation tactics also have been directed at organizations with primarily Asian membership. For example, in Phoenix, Arizona, a church attended mainly by Chinese Americans was found defaced with racial epithets and bullet holes on September 12, 1990. The racist graffiti said, "No Chinks. Go Home to China," and was accompanied by "KKK," the signature of the Ku Klux Klan. *See* Phoenix Gazette, Sept. 14, 1990, § B, at 1. A similar incident was also reported in Glendale, Arizona, in October of 1990: a swastika and the words "White Supreme" were painted on the walls of the Japanese American Citizens' League (JACL) headquarters. A short time later, after being interviewed on television regarding reparations for Japanese Americans interned during World War II, the president of the

JACL received death threats at his home and office. *See* Arizona Republic, Nov. 5, 1990, at B1.

Racially motivated incidents are not limited to specific socio-economic classes or to individuals with a particular level of education. Racial incidents have been on the increase on college campuses throughout the country. Incidents of racially motivated harassment and attacks have been reported at universities such as Harvard, Yale, Brown, the University of Texas, Penn State, Georgetown, the University of Michigan, and many others. *See Race on Campus: Failing the Test?*, Newsweek, May 6, 1991, at 26. In one instance, on May 27, 1991, a Chinese foreign student was attacked by seven white high school students on the Cornell University campus for no other apparent reason than the fact that the student was Asian. *See Anti-Asian Violence at Cornell University*, World J., June 15, 1991, at 3.

Violence against Asians and other people of color is on the rise, increasing in both frequency and intensity. As a civilized society, we must ensure that no one is subjected to hate-based violence and that government plays an active role in preventing such violence.

B. Racially Motivated Crimes Have Been Properly Addressed Through Statutes Prohibiting Such Conduct

As a response to the growing and widespread problem of racial violence, state and local governments across the country have enacted statutes that monitor hate crimes and prohibit specific acts of violence, intimidation, and harassment.[5] The United States Congress has already recognized the gravity of the problem and recently passed the Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140

[5]For a detailed listing of different state hate crimes statutes, see Appendix B.

(1990) (codified at 28 U.S.C.A. 534 (West Supp. 1991)), to monitor and collect data on hate crimes at the national level.

Laws that specifically address the problem of racial violence serve the important function of communicating to individuals who would commit acts of violence that the people in the local community or state do not sanction such acts. These laws also encourage the police to act with particular dispatch in handling racially motivated crimes. As the United States Commission on Civil Rights has noted: "Effective police responses to incidents of racial and religious violence are necessary to keep such incidents from spreading. If the police fail to respond, or respond in ways that clearly demonstrate a lack of sensitivity, perpetrators can interpret the police activity as official sympathy or even sanction." *Intimidation and Violence*, *supra* p. 6, at 17-18.

In 1987, the Minnesota Governor's Task Force on Prejudice and Violence held hearings throughout Minnesota in response to the increasing incidents of racially motivated crimes. The Minnesota Advisory Committee to the United States Commission on Civil Rights held hearings in St. Paul and also recommended a legislative response. *See* Minn. Advisory Comm. to U.S. Comm'n on Civil Rights, *Bigotry and Violence in Minnesota* (1989). During the 1988 legislative session, a series of bias crimes statutes were passed. Many other state legislatures have come to the same conclusion and have passed similar measures.

One of the most common legislative schemes adopted by the various states are those that prohibit the desecration of religious objects or property, cross burning, and intimidation or harassment. For example, under the category of burning or desecration of religious symbols, the State of California prohibits the burning or desecration of religious symbols, including crosses and Nazi swastikas, on a person's property in order to terrorize another person. Cal. Penal Code § 11411 (West Supp. 1991). Other states also include vandalism

against a place of worship or defacement of churches, synagogues, or cemeteries. *See* Appendix B. Other statutory proscriptions include desecration of a place of worship, the wearing of masks or hoods, and the banning of secret societies. *See id.* Many states have enacted statutes criminalizing racial intimidation or harassment. *See id.* Acts such as those alleged to have been committed by petitioner have clearly been recognized by society as being well beyond the protection of free speech.

Unless legislatures take affirmative steps to curb racial violence and send a message that society does not condone racial harassment, intimidation, or violence, minority groups such as Asians and Pacific Islanders will not be able to fully enjoy the civil rights guaranteed by the constitution and the laws of this nation. Thus, preventing and punishing racially motivated violence, harassment and intimidation is a compelling state interest that must be addressed through legislative action.

II. THE ST. PAUL HATE CRIMES ORDINANCE, AS CONSTRUED BY THE MINNESOTA SUPREME COURT, IS CONSTITUTIONAL

In its own attempt to address the pervasive problem of hate-based violence and intimidation, the City of St. Paul enacted section 292.02, which regulates disorderly conduct against people of color, religious minorities, and women. The ordinance states:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn., Legis. Code § 292.02 (1990). As part of a legislative scheme that addresses hate crimes,[6] section 292.02 proscribes behavior targeted against individuals belonging to groups who have suffered -- and continue to suffer -- the most extensive discrimination and have possessed the least power to combat that discrimination.

Petitioner in this case has been accused of a hate crime. In the trial court below, petitioner was charged with disorderly conduct under section 292.02 for burning a cross in an African American family's front lawn during the middle of the night.[7] In addition, petitioner, along with five others, is alleged to have burned a second cross across the street from the family's home and a third cross in the parking lot of an apartment complex with several African American residents. Before the cross burnings, petitioner and his companions are alleged to have engaged in discussions about causing "skinhead trouble" and "burning some niggers."

Without question, petitioner's alleged conduct was meant to harass and intimidate the African American family, not to advocate any political or social views. The conduct in question clearly falls outside the protection of the first amendment. Nevertheless, petitioner contends that he cannot be prosecuted under section 292.02 because it is both overbroad and vague, criminalizing protected expression and providing

---

[6] *See* St. Paul, Minn., Legis. Code § 292.01 (1990) (bias-motivated assault); *id.* § 292.03 (bias-motivated vandalism).

[7] The petitioner was also charged with bias-motivated assault in the fourth degree under a Minnesota state statute. *See* Minn. Stat. Ann. § 609.2231, subd. 4(a) (West Supp. 1991) ("Whoever assaults another because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability . . . , age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.").

insufficient guidance to individuals seeking to determine permissible conduct.

Petitioner's arguments lack merit. Because the ordinance, as authoritatively interpreted by the Minnesota Supreme Court, specifies punishable conduct that is unprotected by the first amendment, the ordinance is constitutional.

A. The Minnesota Supreme Court Properly Narrowed the Scope of the St. Paul Ordinance to Include Only Unprotected Expression

The St. Paul ordinance penalizes bias-motivated conduct that one knows or has reasonable grounds to know causes "anger, alarm or resentment in others." Because section 292.02, as written, appears to apply to an array of expressive conduct, petitioner's overbreadth challenge rests on the assumption that the ordinance sweeps both unprotected and protected conduct into its coverage. However, as narrowed by the Minnesota Supreme Court in its opinion below, the ordinance applies only to conduct that, taken in context, is unprotected by the first amendment. In re *Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

The overbreadth doctrine is based on "[t]he premise that a law should not be invalidated . . . unless it reaches a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 771 (1982). The overbreadth requirement is especially exacting when applied to conduct rather than to "pure speech": "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Further, this Court has long held that a statute may be saved from an overbreadth challenge by a court's narrowing construction of that statute. *See, e.g., Osborne v. Ohio,* 110 S. Ct. 1691 (1990); *Board of Airport Comm'rs v. Jews for*

Jesus, Inc., 482 U.S. 569 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972). "Courts routinely construe statutes so as to avoid the statutes' potentially overbroad reach, apply the statute in that case, and leave the statute in place." *Osborne v. Ohio*, 110 S. Ct. 1691, 1701 (1990). And, this Court often has requested a state court to reinterpret a state statute more narrowly in order to uphold the statute's constitutionality. *See, e.g., Rosen v. California*, 416 U.S. 924 (1974); *Karlan v. City of Cincinnati*, 416 U.S. 924 (1974); *Kelly v. Ohio*, 416 U.S. 923 (1974); *Lucas v. Arkansas*, 416 U.S. 919 (1974).

In this case, the Minnesota Supreme Court has provided a narrowing construction of section 292.02:

> [T]he challenged St. Paul ordinance does not on its face assume that any cross burning, irrespective of the particular *context* in which it occurs, is subject to prosecution. Rather, the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender, or religious bias.

In re *Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991) (emphasis added). The supreme court restricted the ordinance "to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect." *Id.* at 511. Specifically, the court limited prohibited conduct under the ordinance to two settings: (1) "fighting words" -- conduct that itself inflicts injury or tends to incite immediate violence, and (2) incitement -- conduct in which the anger, alarm, or resentment elevates to the level of "imminent lawless action." *Id.* at 510 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (incitement)). Thus in exercising its prerogative to give meaning to Minnesota law, the Minnesota Supreme Court provided

express guidance on the scope of section 292.02:[8] *Only conduct that is itself injurious and violent, or conduct that can lead to violence is prohibited by the ordinance.*

Because this case involves a state law on direct review of a state court decision that has construed the law, the state court's construction is binding on this Court and should only be disturbed to the extent that the construed statute is unconstitutional. *See New York v. Ferber*, 458 U.S. 747, 767, 769 n.24 (1982); *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973); *Gooding v. Wilson*; 405 U.S. 518, 520 (1972). The Minnesota Supreme Court has provided a clear construction of section 292.02 that limits the ordinance to well-defined categories of unprotected expression. This Court, as the ultimate arbiter of the law's constitutionality, must therefore decide the validity of section 292.02 by taking it as a law interpreted to proscribe symbolic expression that is violent or causes violence.

---

[8]The court's narrowing construction of section 292.02 is bolstered by its earlier opinion in In re *Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978). In that case, the court held that the Minnesota disorderly conduct statute, which prohibits engaging in language or conduct tending to "arouse alarm, anger, or resentment in others," is constitutional when limited to "fighting words." *Id.* at 418-19 (quoting Minn. Stat. § 609.72, subd. 1(3)).

The defendant, a 14-year-old child, was convicted of disorderly conduct for shouting "fuck you pigs" at two police officers sitting in their squad car about 15 to 30 feet away. The supreme court reversed, finding that within the given factual context, the defendant's statement was unlikely to incite an immediate breach of the peace or to provoke violent reaction by an ordinary, reasonable person. *Id.* at 419-20.

Subsequent Minnesota decisions have reaffirmed the application of fighting words to disorderly conduct ordinances. *See City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980); *City of Minneapolis v. Lynch*, 392 N.W.2d 700 (Minn. Ct. App. 1986).

B. The St. Paul Ordinance Applies to Unprotected Expression -- Conduct That is Violent or Causes Violence

Freedom of expression is not absolute. This Court has long recognized exceptions to the first amendment's protection of free speech: for example, "fighting words," *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), obscenity, *see Roth v. United States*, 354 U.S. 476 (1957), libel, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), child pornography, *see New York v. Ferber*, 458 U.S. 747 (1982), and incitement of violence, *see Brandenburg v. Ohio*, 395 U.S. 444 (1969), are all outside the shield of the first amendment.

The conduct prohibited by the St. Paul ordinance clearly falls within categories of unprotected speech recognized by this Court.[9] In its narrowing construction of section 292.02,

---

[9]The Minnesota Supreme Court chose to limit its construction of the St. Paul ordinance to include only fighting words or conduct that incites or produces imminent lawless action, categories of expression that have been outside the scope of the first amendment for several years. Recently, a number of commentators have argued for the explicit recognition of racist speech as a category of expression beyond first amendment protection. *See, e.g.*, Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) (suggesting regulation of racist speech in which message is (1) of racial inferiority, (2) directed against a historically oppressed group, and (3) persecutorial, hateful, and degrading); Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 (suggesting regulation of hate speech on university campuses).

The Court need not set aside racist speech (or any other type of hate speech) as a separate unprotected category in order to decide this case. Existing categories of unprotected expression provide sufficient grounds for upholding the constitutionality of the St. Paul disorderly conduct ordinance.

Nevertheless, the basic arguments for criminalizing racist speech rely on similar arguments for applying the current categories of unprotected expression to cross burning and other forms of hate-based symbolic

the Minnesota Supreme Court established two contextual bases for establishing violations of the ordinance: fighting words or incitement of imminent lawless action. In *Chaplinsky v. New Hampshire*, this Court stated that "fighting words," namely "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," fall outside first amendment protection. 315 U.S. 568, 572 (1942). In *Brandenburg v. Ohio*, this Court held that the government may not prohibit the advocacy of violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969). By relying on these parallel doctrines,[10] the Minnesota Supreme Court limited the breadth of section 292.02 to only those forms of symbolic expression that lead to violence.

Burning a cross on an African American family's lawn is precisely the type of symbolic conduct that extends beyond the sphere of constitutionally protected expression. A burning cross is a personal insult, directed at a particular individual and imbued with racial enmity. *Cf. Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) ("Resort to epithets or personal

---

conduct: racist speech can cause tangible injury to the target of the speech and racist speech can cause physical violence to occur. Implicit in the argument to outlaw racist speech is the presupposition that hate speech is not only a cause of violence but a form of violence. *See generally Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 Buffalo L. Rev. 337 (1989).

[10]Although considered separate categories, fighting words and incitement are really two sides of the same coin. *Cf.* L. Tribe, *American Constitutional Law* § 12-18, at 929 n.9 (2d ed. 1988). Fighting words cause a violent reaction in the target of the expression; incitement causes a violent reaction in others against the target of the expression. In either case, the ultimate result is not a further exchange of ideas in the marketplace of ideas. The ultimate result is more violence.

abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . ."). A burning cross is a threat, a threat that carries with it the historical baggage of past terrorism and physical attacks. *Cf. Watts v. United States*, 394 U.S. 705, 707 (1969) (true threats are not constitutionally protected speech); *United States v. Lee*, 935 F.2d 952, 955-56 (8th Cir. 1991) ("Intimidation by threats of physical violence is not protected by the first amendment."). The natural response to such a threat is not debate or more speech; the natural response is violence. Cross burning epitomizes fighting words.[11]

Burning crosses and swastikas have special meanings for those who been the traditional victims of violence in American society. *See* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2365-66 (1989). These symbols carry messages replete with animosity that is rooted in the past and extends into the present; they trigger collective memories that are both painful and frightening.[12] When targeted against an individual or a specific group of individuals, a burning cross or a spray-

---

[11]One commentator has suggested that four elements must be present before the fighting words doctrine makes expression constitutionally unprotected: "The offending language (1) must constitute a personally abusive epithet, (2) must be addressed in a face-to-face manner, (3) must be directed to a specific individual and be descriptive of that individual, and (4) must be uttered under such circumstances that the words would have a direct tendency to cause an immediate violent response by the average recipient." Gard, *Fighting Words and Free Speech*, 58 Wash. U.L.Q. 531, 563 (1980). Petitioner's alleged cross burning would easily satisfy all the criteria listed above.

[12]The injuries inflicted on victims of symbolic violence are real and concrete, causing psychological and emotional harm. *See* Matsuda, *supra*, at 2335-40; Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 135-49 (1982).

painted swastika is not simply a statement. It is a form of violence itself -- symbolic violence.

Hate-based symbols engender violence as well. The link between the violence of symbols and the violence of physical acts is clear: symbolic violence can easily elevate to physical violence. In our nation's history, cross burning has rarely been an empty threat. It has gone hand-in-hand with overt violence: beatings, lynchings, the destruction of home and property. Hate groups such as the Ku Klux Klan have incited the most extreme forms of violence through cross burnings and other symbolic acts.[13] *See generally* Southern Poverty Law Center, *The Ku Klux Klan: A History of Racism and Violence* (3d ed. 1988). As a prelude to violence against people of color, one can find no better symbol than the burning cross.

Context, of course, is critical in determining whether a particular type of symbolic conduct rises to the level of fighting words or incitement. Within a given factual setting, a hateful symbol -- a burning cross, a Nazi swastika, a confederate flag -- may be used to harass or intimidate an individual, or it may simply be used to advocate a political position. *See State v. Miller*, 629 P.2d 748, 751 (Kan. Ct. App.

---

[13]As the United States Commission on Civil Rights has noted, not only have hate groups themselves used symbols as precursors to violence, they have inspired others to use the same hateful symbols:

> Some reported acts of racial and religious intimidation are committed by persons who are said to have, or profess to have, past or present connections with organizations that preach hatred and advocate violence to vent that hatred. Even the perpetrators with no known or professed connection with such groups are clearly imitators of them and adopt their symbols of terror -- the swastika, the burning cross, and the graffiti of hate and intimidation. . . . As far as the victims are concerned, it matters little whether a group or an individual is responsible for the act; the terrorizing effects are the same.

Intimidation and Violence, *supra* p. 6, at 13.

1981) ("[T]he surrounding facts and relationship of the parties involved may be such that . . . the burning of a cross on the property of another is the communication of a terroristic threat.").

Many forms of symbolic expression, despite their offensiveness, could fall outside the scope of the St. Paul ordinance. Waving a Nazi flag in a parade or wearing a white hood and robe, while highly provocative and offensive to many, conveys a message of white supremacy and religious intolerance. *But cf. State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990) (upholding constitutionality of Georgia anti-mask statute). Unless the conduct was directed at particular individuals and could produce violence, it would fall outside the coverage of the ordinance and would remain constitutionally protected expression. *Cf. Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (striking down ordinances preventing dissemination of racist materials and demonstrations by Nazis in Skokie, Illinois), *cert. denied*, 439 U.S. 916 (1978).

Cross burning, therefore, can be distinguished from protected conduct such as flag burning, when examined in context. In its recent flag burning decisions, *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 110 S. Ct. 2404 (1990), the Court held that burning the American flag is symbolic expression protected by the first amendment. Flag burning performed in a public forum as part of a political protest is conduct replete with protected expression -- dissension from conventional political thought, dissatisfaction with legislative processes, distrust of governmental institutions. Cross burning directed against a specific person or group, however, conveys an unambiguous message of hatred and intimidation. *See United States v. Lee*, 935 F.2d 952, 956 & n.5 (8th Cir. 1991); *United States v. Salyer*, 893 F.2d 113, 115-17 (6th Cir. 1989). Any political expression implicit in a cross burning, such as the supremacy of whites over

people of color, is miniscule when compared to the obvious threat of violence against the targeted individuals.

As interpreted by the Minnesota Supreme Court, the St. Paul ordinance extends its coverage only to the most extreme expressive conduct, conduct that amounts to symbolic violence that threatens further violence. By emphasizing the *context* in which the expression occurs, the court's construction of section 292.02 limits the ordinance's coverage to symbolic conduct that is more than just offensive to the average observer. The ordinance is neither overbroad nor vague, since, as narrowed by the supreme court, it defines conduct "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Upholding section 292.02 is thus consistent with the fundamental principle expounded in *Texas v. Johnson*: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U.S. 397, 414 (1989). Petitioner's alleged conduct -- burning a cross on the lawn of an African American family during the middle of the night -- goes beyond the realm of offensiveness and enters the world of threats and violence; it is exactly the type of conduct that should fall outside the first amendment's protection.

CONCLUSION

For the foregoing reasons, the St. Paul, Minnesota ordinance is constitutional, and the decision of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted,

ANGELO N. ANCHETA
Counsel of Record
KATHRYN K. IMAHARA
ASIAN PACIFIC AMERICAN LEGAL
CENTER OF SOUTHERN CALIFORNIA
1010 South Flower Street, Suite 302
Los Angeles, California 90015
(213) 748-2022

DENNIS HAYASHI
DOREENA WONG
ASIAN LAW CAUCUS, INC.
468 Bush Street, 3rd Floor
San Francisco, California 94108

STANLEY MARK
ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, New York 10013

KAREN K. NARASAKI
NATIONAL ASIAN PACIFIC
AMERICAN BAR ASSOCIATION
PERKINS COIE
1201 Third Avenue, 40th Floor
Seattle, Washington 98101

Dated: August 1991

APPENDIX A

RECENT EXAMPLES OF HATE CRIMES AGAINST ASIANS AND PACIFIC ISLANDERS*

June 1982	Vincent Chin, a Chinese American, is beaten to death by two unemployed auto workers in Detroit who blamed him for the downfall of the American automobile industry.
Dec. 1982	Crosses are burned on the lawn of a Filipino family in San Leandro, California.
Sept. 1987	A Cambodian American teenager is drowned near Lowell, Massachusetts by a youth shouting racial slurs.
Jan. 1989	Five Southeast Asian children are gunned down by Patrick Purdy in Stockton, California. Twenty children are wounded.
July 1989	Ming Hai "Jim" Loo, a Chinese American, is beaten to death by men blaming him for American casualties in Vietnam.
Nov. 1989	Three Asian American shop owners, two Chinese American and one Korean American, are beaten and racially taunted by a band of white teens in Castro Valley, California.
Apr. 1990	Two Japanese students are attacked and beaten in La Crosse, Wisconsin by white students.
May 1990	A Hmong youth, riding with two white women co-workers, is beaten and racially taunted by white assailants in Yuba County, California.
Aug. 1990	A Vietnamese teenager is beaten and kicked to death by two "skinheads" in Houston, Texas.
Sept. 1990	The Greater Phoenix Chinese Christian Church in Phoenix is defaced with racial grafitti and bullet

---

*This list is by no means exhaustive; rather, it is illustrative of the many instances of violent bias-motivated acts perpetrated against Asians and Pacific Islanders. The list is compiled from various sources, including newspaper and broadcast media reports and personal accounts presented to *amici curiae*. A complete list of sources is available from counsel for *amici*.

holes.

Sept. 1990 — Two Japanese men driving in their car in San Francisco is struck by the car of a white male. When questioned about why he swerved into the victims' car, the perpetrator says it was because they were "gooks."

Oct. 1990 — Four white men linked with the Ku Klux Klan seriously beat six Japanese students in Denver, Colorado.

Oct. 1990 — The Japanese American Citizen's League's headquarters in Glendale, Arizona is defaced with a painted swastika and the words "White Supreme."

Jan. 1991 — As several Koreans are playing golf in Milpitas, California, one of them is choked by a white man, who remarks "we're big Americans . . . we don't need you . . . Oriental boys here."

Jan. 1991 — In Seattle, Washington, a seventeen-year-old Korean youth is attacked by three white men yelling racial epithets.

Jan. 1991 — "KKK" is spray painted on the home of a Samoan man in Oldsmar, Florida.

May 1991 — A Chinese foreign student is attacked by seven white high school students on the Cornell University campus because he is Asian.

June 1991 — Kimochi, Inc., a Japanese American senior citizens organization in San Francisco, California, receives threatening letters saying "Death to all Former Internees."

June 1991 — Two Japanese American women are assaulted at a restaurant in Huntington Beach, California by seven men and women who taunt, shove, punch, and pour drinks on them. The women were speaking in Japanese and the attackers insisted that they speak English.

June 1991 — A cross is burned in the yard of a Filipino American family in Albuquerque, New Mexico.

Aug. 1991 — A Chinese American high school graduate is beaten unconscious by members of a white-supremacist skinhead group in Fullerton, California.

APPENDIX B

State Hate Crimes Statutes

Cross Burning

Ariz. Rev. Stat. Ann. § 13-1504 (1989)
Cal. Penal Code § 11411 (West Supp. 1991)
Conn. Gen. Stat. Ann. § 46a-58(c) (West 1986)
Fla. Stat. Ann. § 876.17 (West 1976)
Ga. Code Ann. § 16-11-37 (Harrison 1990)
Md. Ann. Code art. 27, § 10A (1987)
N.C. Gen. Stat. § 14-12.12 (1986)
R.I. Gen. Laws § 11-53-2 (1990)
S.C. Code Ann. § 16-7-120 (Law. Co-op. 1985)
Vt. Stat. Ann. tit. 13, § 1456 (Supp. 1990)
Va. Code Ann. § 18.2-423 (1988)
Wash. Rev. Code Ann. § 9A.36.080 (Supp. 1991)

Data Collection

Cal. Penal Code § 13023 (West Supp. 1991)
Conn. Gen. Stat. Ann. § 29-7m (West 1990)
Fla. Stat. Ann. § 877.19 (West Supp. 1991)
Idaho Code § 67-2905 (1989)
Ill. Rev. Stat. ch. 127, para. 55a(31) (Supp. 1991)
Iowa Code Ann. § 80.40 (West Supp. 1991)
Me. Rev. Stat. Ann. tit. 5, § 4660 (1989)
Mass. Gen. Laws Ann. ch. 22, §§ 16 to 19 (West Supp. 1991)
Md. Ann. Code art. 88B, § 9 (1985 & Supp. 1990)
Minn. Stat. Ann. § 626.5531 (West. Supp. 1991)
Or. Rev. Stat. § 181.550 (1991)
R.I. Gen. Laws § 42-28-46 (1988)

Desecration/Defacement of Religious Objects or Property

Ala. Code § 13A-11-12 (1982)
Ariz. Rev. Stat. Ann. § 13-1604 (1989)
Ark. Stat. Ann. § 5-71-215 (1987)
Cal. Penal Code § 11411 (West Supp. 1991)
Conn. Gen. Stat. Ann. § 46A-58 (West 1986)
Colo. Rev. Stat. § § 18-9-113 (1986 & Supp. 1990)
Del. Code Ann. tit. 11, § 1331 (1987 & Supp. 1990)
Haw. Rev. Stat. § 711-1107 (1985)

Idaho Code § 18-6201 (1987)
Ill. Rev. Stat. ch 38, § 21-1.2 (Supp. 1991)
Ind. Code Ann. § 35-43-1-2 (West Supp. 1990)
Kan. Stat. Ann. § 21-4111 (1988)
Ky. Rev. Stat. Ann. § 525.110 (Michie/Bobbs-Merrill 1990)
Me. Rev. Stat. Ann. tit. 17-A § 507 (1983 & Supp. 1990)
Md. Ann. Code art. 27, § 470A (Supp. 1990)
Mass. Gen. Laws Ann. ch. 266, § 98 (West 1990)
Miss. Code Ann. § 97-17-39 (Supp. 1991)
Mo. Rev. Stat. § 574.085 (Supp. 1991)
N.J. Stat. Ann. § 2C:33-9 (West 1982)
Or. Rev. Stat. § 166.075 (1990)
18 Pa. Cons. Stat. Ann. § 5509 (Purdon 1985)
Tenn. Code Ann. § 39-17-311 (Supp. 1990)
Tex. Penal Code Ann. § 42.09 (Vernon 1989)
Va. Code Ann. § 18.2-127 (Supp. 1991)

Desecration of a Place of Worship
Ariz. Rev. Stat. Ann. § 13-1604 (1989)
Ga. Code Ann. § 16-7-26 (Harrison 1990)
Mass. Gen. Laws Ann. ch. 266, §§ 2, 127A (West 1990)
N.J. Stat. Ann. § 2C:33-9 (West 1982)
N.M. Stat. Ann. § 30-13-1 (1984)
Okla. Stat. Ann. tit. 21, § 1765 (West 1983)
Va. Code. Ann. §§ 18.2-127, 18.2-138 (Supp. 1991)

General Civil Rights Statute - Criminal
Idaho Code §§ 18-7301 to -7303 (1987)
Mass. Gen. Laws Ann. ch. 265, § 37 (West 1990)
Mont. Code Ann. § 45-5-221 (1989)
N.D. Cent. Code § 12.1-14-05 (1985)
18 Pa. Cons. Stat. Ann. § 2710 (Purdon 1983)
R.I. Gen. Laws § 9-1-35 (1985)
S.C. Code Ann. § 16-5-10 (Law. Co-op. 1985)
Vt. Stat. Ann. tit. 13, § 1457 (Supp. 1990)
Wis. Stat. Ann. § 895.75 (West Supp. 1990)

General Civil Rights Statute - Civil
Neb. Rev. Stat. § 20-148 (1987)

N.Y. Civ. Rights Law §§ 40-c, 40-d (McKinney 1991)
Or. Rev. Stat. § 30.190 (1988)

General Intimidation/Harassment - Criminal
Ala. Code § 13A-11-12 (Supp. 1982)
Ariz. Rev. Stat. Ann. § 13-1504 (1989)
Ark. Stat. Ann. § 5-71-207 (1987)
Cal. Penal Code §§ 422.6, 11410 (West Supp. 1991)
Colo. Rev. Stat. § 18-9-121 (Supp. 1990)
Conn. Gen. Stat. Ann. § 53-37 (West 1985)
Ga. Code Ann. § 16-11-39 (Harrison 1990)
Idaho Code §§ 18-7901 to -7904 (1987)
Ill. Rev. Stat. ch. 38, § 12-7.1 (West Supp. 1991)
Iowa Code Ann. § 729.5 (West Supp. 1991)
Me. Rev. Stat. Ann. tit. 17 §§ 2931-2932 (1983 & Supp. 1990)
Mass. Gen. Laws Ann. ch. 265, § 39 (West 1990)
Minn. Stat. Ann. § 609.2231 (West Supp. 1991)
Nev. Rev. Stat. § 207-185 (1989)
N.J. Stat. Ann. §§ 2C:12-1, 2C:33-4, 2C:43-7, 2C:44-3 (1991)
N.Y. Penal Law § 240.31 (McKinney Supp. 1989)
N.C. Gen. Stat. § 14-12.13 (1986)
N.D. Cent. Code § 12.1-14-04 (1985)
Ohio Rev. Code. Ann. § 2927.12 (Anderson 1987)
Or. Rev. Stat. §§ 166.155, 166.165 (1990)
18 Pa. Cons. Stat. Ann. § 2710 (Purdon 1983)
R.I. Gen. Laws § 11-42-3 (Supp. 1990)
S.D. Codified Laws Ann. § 22-27-1 (1988)
Tenn. Code Ann. § 39-17-309 (Supp. 1990)
Wash. Rev. Code Ann. § 9A.36.080 (Supp. 1991)
Wis. Stat. Ann. § 943.012 (West Supp. 1990)

General Intimidation/Harrasment - Civil
Ariz. Rev. Stat. Ann. § 13-1604 (1989)
Cal. Civ. Code §§ 51.7, 52.1 (West Supp. 1991)
Me. Rev. Stat. Ann. tit. 5, §§ 4681-4683 (Supp. 1990)
Mass. Gen. Laws Ann. ch. 12, §§ 11H to 11J (West 1990)
Mo. Rev. Stat. § 537.523 (Supp. 1991)

N.C. Gen. Stat. § 99D-1 (1987)
Ohio Rev. Code Ann. § 2921.45 (Anderson 1987)
Wis. Stat. Ann. § 939.645 (West Supp. 1990)

Harassment through Publications/Group Libel
Fla. Stat. Ann. § 836.11 (West 1976)
Mass. Gen. Laws Ann. ch. 272, § 98C (West 1990)

Disturbance of Religious Worship
Ark. Stat. Ann. § 5-71-207 (1987)
Cal. Penal Code §§ 302, 11412 (West Supp. 1991)
Fla. Stat. Ann. § 871.01 (1976)
Idaho Code § 18-6201 (1972)
Md. Ann. Code art. .27, § 470A (Supp. 1990)
Mass. Gen. Laws Ann. ch. 272, § 38 (West 1990)
Mich. Stat. Ann. § 28.366 (Callaghan 1990)
Minn. Stat. Ann. § 609.28 (West 1987)
Miss. Code Ann. § 97-35-17 (1973)
Nev. Rev. Stat. § 201.270 (1986)
N.M. Stat. Ann. § 30-13-1 (1984)
N.Y. Penal Law § 240.21 (McKinney 1989)
Okla. Stat. Ann. tit. 21, §§ 914, 915 (West 1983)
S.D. Codified Laws Ann. § 22-27-1 (1988)
Va. Code Ann. § 18.2-415 (Supp. 1991)
W. Va. Code § 61-6-13 (1989)

Paramilitary Training
Ark. Stat. Ann. § 5-71-302 (1985)
Cal. Penal Code § 11460 (West 1982)
Colo. Rev. Stat. § 18-9-120 (1986)
Conn. Gen. Stat. Ann. § 53-206B (West 1986)
Fla. Stat. Ann. § 790.29 (West Supp. 1991)
Idaho Code §§ 18-8101 to -8105 (1987)
Ill. Rev. Stat. ch. 129, § 220.94a (West Supp. 1991)
Mich. Stat. Ann. § 28.796(1) (Callaghan 1990)
Mo. Rev. Stat. § 574.070 (Supp. 1991)
Neb. Rev. Stat. § 28-1481 (1989)
N.C. Gen. Stat. § 14-288.20 (1986)
N.J. Stat. Ann. § 2C:39-14 (West 1991)

Or. Rev. Stat. § 166.660 (1990)
R.I. Gen. Laws §§ 11-55-2, 11-55-3 (Supp. 1990)
Va. Code Ann. §§ 18.2-433 (1988)

Secret Societies
N.C. Gen. Stat. §§ 14-12.2 to -.12.6 (1986)

Sentence Enhancement
Cal. Penal Code §§ 190.2(a)(16), 422.7, 1170.75, 1170.85 (West Supp. 1991)
Fla. Stat. Ann. § 775.085 (Supp. 1991)
Ill. Rev. Stat. ch. 38, § 1005-5-3.2 (Supp. 1991)
Mont. Code Ann. § 45-5-222 (1989)

Threats to Immigrants
R.I. Gen. Laws § 11-53-3 (Supp. 1990)

Wearing of Masks/Hoods/Disguises
Conn. Gen. Stat. Ann. § 53-37a (West 1985)
Fla. Stat. Ann. § 876.12 (West Supp. 1991)
Ga. Code Ann. § 16-11-38 (Harrison 1990)
Ill. Rev. Stat. ch. 38, para. 12-4 (Supp. 1991)
La. Rev. Stat. Ann. § 14:313 (West 1986)
Mich. Stat. Ann. § 28.628 (Callaghan 1990)
Minn. Stat. Ann. 609.735 (West 1987)
N.C. Gen. Stat. §§ 14-12.7 to -12.11, 14-12.14 (1986)
Okla. Stat. Ann. tit. 21, § 1301 (West 1983)
S.C. Code Ann. § 16-7-110 (Law. Co-op. 1985)
Tenn. Code Ann. § 39-17-309(c) (Supp. 1990)
Va. Code Ann. § 18.2-422 (1988)
W. Va. Code § 61-6-22 (1989)
Wis. Stat. Ann. § 939.641 (West 1985)

No. 90-7675

(18)

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

R.A.V.,
Petitioner,
vs.
ST. PAUL, MINNESOTA,
Respondent.

On Writ of Certiorari To The
Supreme Court of Minnesota

BRIEF FOR AMICI CURIAE LEAGUE OF MINNESOTA CITIES CITY OF MINNEAPOLIS CITY OF ST. PAUL IN SUPPORT OF RESPONDENT

CARLA J. HEYL
Counsel of Record
League of Minnesota Cities
183 University Avenue East
Saint Paul, Minnesota 55101
(612) 227-5600

JANE A. McPEAK
St. Paul City Attorney
JEROME J. SEGAL
Assistant City Attorney
647 City Hall-Courthouse
15 West Kellogg Boulevard
Saint Paul, Minnesota 55102
(612) 298-5121

ROBERT J. ALFTON
Minneapolis City Attorney
A-1700 Hennepin County Government Center
300 South Sixth Street
Minneapolis, Minnesota 55487-0170
(612) 673-2010

Attorneys for Amici Curiae

1991-EXECUTEAM / LAW DIV., 93 W. Little Canada Rd., St. Paul, MN 55117 • 612/483-8793 • 800/747-8793

BEST AVAILABLE COPY

27 pp

QUESTIONS PRESENTED

Should this court apply the overbreadth doctrine in reviewing a city ordinance when a state's highest court has placed a limiting construction on the ordinance to prevent it from applying to constitutionally protected activity?

May a city enact an ordinance to prohibit intentional conduct aimed at causing fear and intimidation of a person caused in part, and done, on the basis of race, color, creed, religion or gender?

TABLE OF CONTENTS

Interest of Amici Curiae 1

Summary of the Argument 2

Argument

ST. PAUL ORDINANCE SECTION 292.02 IS NOT OVERBROAD AND DOES NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH 3

1. This Court Should Follow The Limiting Construction Placed On The Ordinance By The Minnesota Supreme Court And Find That The Ordinance As Applied, Is Not Unconstitutionally Overbroad 3

   A. The Minnesota Supreme Court's authoritative construction of section 292.02 eliminates the possibility of impermissible application and is binding on this court 5

   B. Section 292.02, as construed below, is not void for vagueness 6

2. St. Paul Ordinance Section 292.02 Is A Permissive Restriction On Petitioner's Conduct, And Its Application Does Not Violate The First Amendment Of The United States Constitution 8

   A. The governmental interest is unrelated to suppression of speech 10

   B. The ordinance is within the constitutional power of the government 11

C. The ordinance furthers a substantial governmental interest 12

D. The ordinance has no greater restriction on first amendment freedom than is essential to further the state's interest; the ordinance prohibits only conduct which is not constitutionally protected activity 14

Conclusion 19

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Arnett v. Kennedy, 416 U.S. 134 (1974) 7

Beauharnais v. Illinois, 343 U.S. 250 (1952) 14

Boos v. Barry, 485 U.S. 312 (1988) 10

Brandenburg v. Ohio, 395 U.S. 444 (1969) 5, 7

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 4, 7

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 3

Cantwell v. Connecticut, 310 U.S. 296 (1940) 5, 14

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 5, 6, 7

Cohen v. California, 403 U.S. 15 (1971) 15, 16, 17

Colten v. Kentucky, 407 U.S. 104 (1972) 7

Connally v. General Construction Co., 269 U.S. 385 (1926) 6

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 15

Frisby v. Schultz, 487 U.S. 474 (1988) 5, 10, 13

Gooding v. Wilson, 405 U.S. 518 (1972) 6

Kolendar v. Lawson, 461 U.S. 352 (1983) 4, 7

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974) 18

Lewis v. City of New Orleans, 415 U.S. 130 (1974) 6

Members of City Council v. Taxpayers For Vincent,
466 U.S. 789 (1984) 3

NAACP v. Button, 371 U.S. 415 (1963) 3

New York v. Ferber, 458 U.S. 747 (1982) 3, 6

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 10

Rowan v. Post Office Department,
397 U.S. 728 (1970) 18

Secretary of State of Maryland v.
Joseph H. Munson Co., 467 U.S. 947 (1984) 4

Smiley v. Kansas, 196 U.S. 447 (1905) 6

Smith v. Goguen, 415 U.S. 566 (1974) 7

Spence v. Washington, 418 U.S. 405 (1974) 8

Texas v. Johnson, 491 U.S. 397 (1989) 8, 9, 15, 16, 17

United States v. Nash, 229 U.S. 373 (1913) 8

United States v. O'Brien, 391 U.S. 367 (1968) 9, 18

Village of Hoffman Estates v. Flipside,
Hoffman Estates, Inc., 455 U.S. 489 (1982) 15

Watts v. United States, 394 U.S. 705 (1969) 15

FEDERAL DECISIONS:

Collin v. Smith, 578 F.2d 1197 (7th Cir.),
cert. denied, 439 U.S. 916 (1978) 16, 17

United States v. Mitchell, 463 F.2d 187
(8th Cir.1972), *cert. denied*, 410 U.S. 969 (1973) 15

United States v. Lee, 935 F.2d 952
(8th Cir. 1991) 10, 11, 13, 14

United States v. Orozco-Santillan,
903 F.2d 1262 (9th Cir.1990) 15

MINNESOTA DECISIONS:

In re S.L.J., 263 N.W.2d 412 (Minn. 1978) 4

In the Matter of R.A.V., 464 N.W.2d 507
(Minn. 1991) 5

STATE DECISION:

Village of Skokie v. National Socialist Party
of America, 373 N.E.2d 21 (Ill. 1978) 16

UNITED STATES CONSTITUTION:

Amendment I . . . . . *passim*
Amendment XIV 11

MINNESOTA STATUTES:

Minn. Stat. § 609.2231, subd. 4 (1990) 13

Minn. Stat. § 609.595, subd. 1a (1990) 13

Minn. Stat. § 609.605, subd. 3 (1990) 13

Minn. Stat. § 609.72 (1990) 4, 14

Minn. Stat. § 609.746, subd. 3 (1990) 13

ORDINANCE:

St. Paul, Minn., Ordinances ch. 292,
§ 292.02 (1990) . . . . . *passim*

INTEREST OF AMICI CURIAE

The League of Minnesota Cities has a membership of 802 out of the 856 cities of Minnesota and represents the common interests of those cities before the courts, as well as other governmental bodies. The City of Minneapolis is the largest city in Minnesota and has an ethnically diverse population in which bias-motivated crime exists. The City of St. Paul is the state's second largest city and the author of the ordinance which is under review before this court. Because this is a criminal proceeding, the City of St. Paul has never been a party to this action. The parties have consented to our participation in this case. The letters granting consent are on file with the clerk.

Our interest in this matter is public in nature. We support Respondent State of Minnesota's position that the ordinance is constitutional as it has been construed to apply by the Minnesota Supreme Court. Cities have the authority, and should be able, to prohibit intentional conduct aimed at causing fear and intimidation in another, especially when the act is done on the basis of race, color, creed, religion, or gender. A decision striking down this ordinance would call into question the constitutionality of disorderly conduct statutes in general, which is one of the most frequently charged crimes in these urban areas.

SUMMARY OF THE ARGUMENT

1. Courts owe great deference to the legislative intent of a law's authors. The Minnesota Supreme Court gave the proper deference to that intent in interpreting the statute to be a constitutional prohibition against only fighting words and imminent lawless action, such as breaches of the peace and assaults. By applying the state court's limiting construction, no protected activity is prohibited. Nor is the ordinance unconstitutionally vague after its application has been limited. There is still sufficient guidance for a person to understand what acts are prohibited.

2. The St. Paul ordinance is a content neutral prohibition on actions which harm the city's residents. The ordinance prevents conduct which would otherwise be prohibited in a disorderly conduct statute. To the extent that the prohibited conduct constitutes expressive activity which is afforded some level of First Amendment protection, this ordinance constitutes a valid prohibition against activity which harms individuals in our society. There is a substantial government interest in preventing actions causing fear and intimidation to specific individuals. The state also has an important interest in protecting the privacy of individuals in their own homes and protecting them from unwanted confrontive speech. The scope of the ordinance is limited and narrowly tailored to prohibit only unprotected activity. A person may still express his unpopular viewpoints through other means of communication which are not directed at harming a specific individual.

ARGUMENT

ST. PAUL ORDINANCE SECTION 292.02 IS NOT OVERBROAD AND DOES NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

1. This Court Should Follow The Limiting Construction Placed On The Ordinance By The Minnesota Supreme Court And Find That The Ordinance As Applied, Is Not Unconstitutionally Overbroad.

A person whose speech or conduct is subject to legitimate prosecution is permitted by the overbreadth doctrine to challenge the constitutionality of a statute on its face on grounds the statute "also threatens others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). This unusual approach is designed to alleviate the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The overbreadth doctrine is "strong medicine," to be employed with hesitation, and then only as a last resort. *New York v. Ferber*, 458 U.S. 747, 769 (1982). The possibility that a statute might be misapplied or misused is insufficient for a facial challenge to succeed. *Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789, 800 (1984). Only when there is a "realistic danger" that a challenged statute "will significantly compromise recognized First Amendment protections," *id.* at 801, may the law

be challenged on overbreadth grounds. In other words, the provision's existence, in and of itself, must threaten the unfettered expression of ideas. Section 292.02 no more inhibits free expression than traditional disorderly conduct statutes or ordinances.[1]

A statute must be substantially overbroad before a reviewing court can invoke the overbreadth doctrine. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This is particularly true when conduct and speech are joined, *id.*, as in the instant case. "If the overbreadth is 'substantial,' the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Id.* In making this assessment, this court considers the actual text of the statute as well as any limiting constructions that have developed. *Kolender v. Lawson*, 461 U.S. 352, 355, (1983).

Section 292.02, like other breach of peace statutes, prohibits a "core of easily identifiable and constitutionally proscribable conduct." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984). The risk that application of section 292.02 by police and prosecutors might penalize

---

[1] For example, Minnesota's disorderly conduct statute, Minn. Stat. 609.72, states in pertinent part:

Whoever does any of the following in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of peace, is guilty of disorderly conduct, which is a misdemeanor.

(3) Engages in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others.

The constitutionality of section 609.72 (3) was upheld by the Minnesota Supreme Court in *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978).

protected expression is insignificant. Certainly, the facts here do not suggest otherwise: What could be more central to the concerns that prompted enactment of section 292.02 than the burning of a cross on the front lawn of a black family's home?

A. The Minnesota Supreme Court's authoritative construction of section 292.02 eliminates the possibility of impermissible application and is binding on this court.

It is the general practice of reviewing courts to interpret laws so as to avoid constitutional problems. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 483 (1988). The Minnesota Supreme Court interpreted section 292.02 in its decision below to apply to expressive conduct that is the functional equivalent of "fighting words," *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *In the Matter of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991). The state court found the ordinance to be reasonably subject to an interpretation limiting its scope to conduct which is outside First Amendment protection. *Id.* The court reasoned that "resort to epithets or personal abuse, [however], is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act [raises] no question under that instrument." *Id.* at 511 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)). "So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order." *Id.*

In limiting the application of the ordinance, the Minnesota

court recognized the fundamental governmental purpose behind section 292.02 and other breach of peace statutes -- to protect public safety and make possible the quiet enjoyment of communal life -- and ensured that the ordinance would not be used to restrict lawful political and social expression. This construction also follows the legislative intent of prohibiting only conduct which would cause fear and intimidation to a specific person.

A state court's construction of a state statute is binding on direct review by this Court. *New York v. Ferber*, 458 U.S. 747 769, n.24 (1982); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Smiley v. Kansas*, 196 U.S. 447, 455 (1905). This is equally true when a state court has construed a municipal ordinance, which in Minnesota has the force and effect of a statute within the enacting jurisdiction. There is no alternative for this Court but to weigh petitioner's challenges to section 292.02 in the context of the Minnesota Supreme Court's interpretation of the St. Paul ordinance. The circumstances here are thus markedly different than in *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (Georgia courts had not limited statute's application to fighting words), for example, or *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (state court contemplated a broader reading of city ordinance than would be permitted under fighting words doctrine).

B. Section 292.02, as construed below, is not void for vagueness.

A criminal prohibition is void for vagueness, and thus unenforceable, when its language is so ambiguous that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926). In First Amendment cases, the vagueness doctrine, like the concept of overbreadth, serves to avoid

the chilling of constitutionally prohibited expression, *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974), and to prevent selective enforcement of a penal statute against persons espousing unpopular ideas. *Kolendar v. Lawson*, 461 U.S. 352, 357-61 (1983).

Contrary to petitioner's assertions, limiting the reach of a statute to prohibit what the First Amendment does not protect is an entirely appropriate means of avoiding potential overbreadth challenges and does not automatically raise vagueness problems. This Court has accepted such an approach in past cases, *Colten v. Kentucky*, 407 U.S. 104, 111 (1972), and engaged in the practice itself, *Arnett v. Kennedy*, 416 U.S. 134, 162 (1974) (plurality opinion), without suggesting that it had substituted vagueness for overbreadth. In fact, this court has held that where conduct and not merely speech is involved, and a law is not substantially overbroad, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 614-16 (1973).

The terms employed by the Minnesota Supreme Court below are unobjectionable from a First Amendment perspective. As construed by the court, section 292.02 applies to expression that itself inflicts injury or tends to incite immediate violence, *Chaplinsky*, 315 U.S. at 572, as well as to conduct designed to incite or result in imminent lawlessness and likely to incite or cause such behavior, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

These terms are readily comprehensible. They afford fair notice of what is forbidden and provide sufficient guidance for officials charged with enforcing the ordinance. Greater precision is neither required nor feasible when the criminal law seeks to prohibit breaches of the peace.

Police departments throughout the United States have

extensive experience working with disorderly conduct statutes and ordinances. The likelihood of discriminatory enforcement of section 292.02 is no greater than when a more traditional prohibition of a disorderly conduct statute is employed. Ultimately, whether an accused can be prosecuted successfully under section 292.02 will depend on the threatened result of the defendant's actions as much as the actions themselves -- and on a jury's determination that the defendant acted unreasonably under the circumstances. There is nothing unusual or constitutionally improper about this. As Justice Holmes stated, "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." *United States v. Nash*, 229 U.S. 373, 377 (1913).

2. St. Paul Ordinance Section 292.02 Is A Permissive Restriction On Petitioner's Conduct, And Its Application Does Not Violate The First Amendment Of The United States Constitution.

In any analysis involving the First Amendment, the threshold question is whether Petitioner's actions constitute expressive conduct, thereby invoking the First Amendment's protections. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

Conduct may be sufficiently imbued with elements of communication so as to fall within the scope of the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409 (1974). In determining whether particular conduct possesses sufficient communicative elements to invoke the First Amendment, the court must decide whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 410-411.

This brief proceeds on a predicate that burning a cross may be conduct which possesses sufficient elements of communication to implicate the First Amendment in some cases. However, it is not necessarily true that the burning of this cross was protected First Amendment activity. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). It must be considered that, as construed, this ordinance prohibits only the type of conduct which would constitute disorderly conduct, and that Petitioner's actions fall within this scope.

The initial inquiry in determining whether this activity is protected by the First Amendment is whether the governmental interest in regulation is related to the suppression of free expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). If the interest is related to the suppression of expression, we must apply a heightened standard of review. *Id.* If the interest is unrelated to the suppression of expression, the more deferential standard enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), will apply. *Id.* When speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *O'Brien*, 391 U.S. at 376. Such a regulation is sufficiently justified, despite its incidental impact upon First Amendment interests: 1) if it is within the constitutional power of the government; 2) if it furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

A. The governmental interest is unrelated to suppression of speech.

The governmental interest supporting this regulation is unrelated to the suppression of free expression. Section 292.02 does not prohibit the communication of offensive or racist messages; it does not simply prohibit the burning of a cross. Section 292.02 does not prohibit Petitioner from burning a cross to convey an offensive message or a message of racial hatred. Rather, the ordinance prohibits Petitioner from burning a cross with the intent to threaten or intimidate targeted individuals on the basis of their race, color, creed, religion or gender. See *United States v. Lee*, 935 F.2d 952, 955 (8th Cir. 1991). This is comparable to forbidding an action which would prevent individuals from enjoying their federally guaranteed rights. See *Id.*

The ordinance is a content neutral speech restriction because it can be justified without reference to the content of the regulated speech. See *Boos v. Barry*, 485 U.S. 312, 320 (1988). The ordinance is aimed at prohibiting conduct which is equivalent to disorderly conduct in nature. The justification for the prohibition of this type of conduct is related to the secondary effects of that conduct. See *Id.* citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). This ordinance would apply in similar situations where disorderly conduct could be charged. This ordinance leaves open numerous alternative channels of communication for people who want to espouse unpopular political and social views. A person could still distribute leaflets, picket or march on a public street, or communicate his message to the general public. However, there is no right for a person to intrude on private property to harass and intimidate a specific family. See *Frisby v. Schultz*, 487 U.S. 474, 486 (1988). Therefore, section 292.02 is a content neutral ordinance which prohibits a person

from causing fear or threatening or intimidating others on the basis of race, creed, color, religion or gender.

B. The ordinance is within the constitutional power of the government.

Section 292.02 is intended to protect individuals from being intimidated or terrorized on the basis of their race and religion. It is also intended to discourage further racial, religious and gender bias within the community. The enactment of this ordinance is a valid police power action necessary to further the safety and order of society. It is also a valid governmental attempt to further secure rights of citizens as guaranteed under the Fourteenth Amendment and other civil rights laws enacted by Congress and the State of Minnesota. See *Lee*, 935 F.2d at 955.

Moreover, this ordinance is intended to prohibit disorderly conduct within the community. The control of disorderly conduct has always been within the authority of police power; and is one of the most frequently charged crimes in major urban areas throughout the United States. Even though the St. Paul City Council made a political or social statement in passing this particular ordinance, that does not invalidate the government's authority to prohibit disorderly conduct. It is within the government's power to make a statement as to what goals it believes society should pursue. This is true regardless of whether the city council supports anti-discrimination legislation, implements liquor control laws, or enacts a bias-motivated disorderly conduct ordinance.

C. The ordinance furthers a substantial governmental interest.

The City's interests that are unrelated to expression are significant and numerous. The City has a strong interest in protecting the safety of its citizens. The City has an important and substantial, if not compelling, governmental interest in protecting citizens from fear and intimidation and imminent lawless conduct done on the basis of race or religion. Additionally, for the last half of the century, government at every level has found it to be a compelling state interest to enact regulations aimed at eliminating racial, religious, and gender discrimination in housing, education, business and nearly every aspect of societal life. This is precisely the same compelling governmental interest which the St. Paul ordinance is intended to further. The ordinance advances the state's interest in providing an environment where persons of all beliefs, persuasions, colors and origins may live undisturbed.

The ordinance prevents only conduct which itself inflicts injury or is likely to incite imminent lawless action; conduct equivalent to breach of the peace, terroristic threat, and assault which are permissibly prohibited. The ordinance protects its citizens from a type of confrontation that is inherently dangerous to both the perpetrator and the victim. This is a substantial governmental interest because of the nature of the crime and its unique harm to the individual victims, as well as to society's interest in eliminating racial discrimination.

The State's primary interest is in preventing breaches of the peace and provocation of violence and riot. Unlike the flag burning cases where only the general public may be offended by the message conveyed, the historic significance in the United States of burning a cross on a black family's property conveys a direct threat and provocation of violence that makes such acts tantamount to "fighting words" and threatens "imminent lawless action"; thus

taking the expression outside the First Amendment's protections.

Harassing an individual by using well known biased-based symbols and characterizations may be tantamount to intimidation by threat of physical violence. Cross burning is not always mere advocacy, but rather may be an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people. Cross burning in a black family's yard is an especially intrusive act which invades the substantial privacy interests of its victims in an essentially intolerable manner. To protect the inhabitants of this nation from such an attack on civil rights, does not violate the spirit of the First Amendment.

Additionally, the interest in residential privacy is clearly implicated in this legislation as applied to protect the right to be free from racial and religious harassment at a person's home. See *Lee*, 935 F.2d at 956; Cf. *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) ("There simply is no right to force speech into the home of an unwilling listener."). A person may not target an individual with the intent to threaten or intimidate that individual so as to interfere with the individual's right to privacy in the home. *Frisby*, 487 U.S. at 486. The individual would be trapped within the home and have no means of avoiding the unwanted speech. *Id.* at 487. The ordinance thus prohibits a person from having a "captive" audience for his objectionable speech.

The Minnesota state legislature has also recognized the substantial interest in preventing bias-motivated crime by enhancing the penalty for numerous acts done on the basis of bias motivation. See Minn. Stat. § 609.2231, subd. 4 (1990) (assault); Minn. Stat. § 609.595, subd. 1a (1990) (criminal damage to property); Minn. Stat. § 609.605, subd. 3 (1990) (trespass); and Minn. Stat. § 609.746, subd. 3 (1990) (interference with privacy).

The City of St. Paul recognized the important governmental interest in preventing bias-motivated crime by enacting this specific disorderly conduct law, rather than enacting a disorderly conduct law similar to state statute. See Minn. Stat. § 609.72 (1990).

D. The ordinance has no greater restriction on First Amendment freedom than is essential to further the state's interest; the ordinance prohibits only conduct which is not constitutionally protected activity.

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those by which their very utterance inflict injury or tend to incite to an immediate breach of the peace." *Beauharnais v. Illinois*, 343 U.S. 250, 255-256 (1952) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

The incidental restriction on First Amendment freedom in this case is no greater than that which is essential to further the governmental interest. Section 292.02 is a narrowly tailored law which targets and eliminates the exact source of "evil" it seeks to remedy by requiring some knowledge of committing a harmful act. *See Lee*, 935 F.2d at 955. The ordinance is violated only if it is proven beyond a reasonable doubt that the defendant possessed knowledge or had reason to know that his actions would "arouse anger, alarm or resentment~~ in~~ others on the basis of race, color, creed, religion or gender. See *Lee*, 935 F.2d at 955. If required knowledge is absent in the actor, the ordinance is not violated and there is no restriction on First Amendment activity.

An ordinance which prohibits fighting words and imminent lawless conduct does not reach a substantial amount of constitutionally protected conduct. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). Intimidation by threats of physical violence is not protected by the First Amendment. See, e.g., *Watts v. United States*, 394 U.S. 705, 707 (1969) (true threats are not constitutionally protected speech); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir.1990) ("A 'true' threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the First Amendment."); *United States v. Mitchell*, 463 F.2d 187, 191 (8th Cir.1972) (violent threats are devoid of constitutional protection), *cert. denied*, 410 U.S. 969 (1973). However, physical violence does not mark the constitutional line beyond which government may not legislate. Although persons must generally tolerate highly offensive and disturbing speech, the government may restrict such speech where it intrudes on the privacy of the home or where the degree of captivity makes it impractical for an unwilling listener or viewer to avoid exposure to the speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-11 (1975).

The present case is distinguishable from other cases where the limitations on speech were found to be unconstitutional. The conduct in this case occurred on private property, was directed at the individuals living there, and was reasonably likely to threaten, intimidate, harass or terrorize such individuals or to provoke a violent response. This is in contrast to *Texas v. Johnson*, 491 U.S. 397, 409 (1989) where this court concluded that no reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. *Accord Cohen v. California*, 403 U.S. 15, 20 (1971) (where convicted person publicly displayed provocative political statement

on the back of his jacket, "no individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult"). Both *Johnson* and *Cohen* involved political speech in a public place that was not directed at a specific individual. This type of conduct is not present in this case.

The Nazi march cases are also not similar to the present case. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. den.*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978). Again, these activities occurred on public property and were not aimed at any specific individual. Additionally, there was forewarning of the potentially offensive conduct so that a person could avoid confrontation with the offending march and police could prepare for public safety while still permitting the speech to occur.

St. Paul's ordinance does not ban the burning of crosses, or the making of swastikas, or any other symbol. The ordinance does not ban the display of any symbol. Rather, when read correctly, this ordinance creates only a prohibition of the crime of placing one in reasonable apprehension of his or her personal safety due to threatening conduct made with regard to the victim's race, color, creed, religion, or gender. This crime is a normal legislative extension of common law assault, necessary to meet a need in our society. That need is to protect those who are being threatened by aggressors who use symbols of organized murder to terrorize the victim when those symbols are used specifically because the perpetrator knows of the sensitivity of the victim to that symbol.

Thus, the St. Paul ordinance may properly be interpreted to apply only to conduct which is unprotected under the First Amendment. When one examines the context in which Petitioner's

act occurred, it is clear that such conduct may be punished without abridging Petitioner's First Amendment rights. If Petitioner wished to convey a generalized message and provoke thought and discussion, he could have engaged in the same conduct on his own property without threatening the property or safety of another unconsenting, unwilling participant. If Petitioner wished to engage in political speech or to express his distaste and dislike for people of other races, origins, or beliefs, he could have done so in a context in which his ideas and conduct, however abhorrent, were not immediately threatening or endangering. Because alternative avenues of communication were available, the ordinance does not abridge Petitioner's freedom of speech.

In the present matter, Petitioner directly insulted and intimidated innocent persons, endangered those persons' property, and conveyed an immediate threat of bodily harm. The victims in this case may well have been afraid to go outside their home, even to extinguish the unlawful fire on their property, for fear of being physically attacked. Recent American history demonstrates that racial hatred has resulted in murders of blacks in their own yards or in other areas where people should feel "safe." Cross burnings themselves have long been associated with lynchings and other racially-motivated violence. This is precisely the result St. Paul Ordinance Section 292.02 was intended to prevent.

The instant case is distinguishable from *Johnson*, *Cohen*, and *Collin*, where the defendants were merely expressing controversial political opinions to society at large. In contrast, a cross burning on another's property is highly likely to be taken not only as direct personal insult, but as an immediate threat to that person's safety. In addition, unlike the situation in *Johnson*, *Cohen*, and *Collin*, where any offended persons could avert their eyes or leave the scene, the victims in this case were prisoners in their own

home, unable to avoid or ignore the burning cross. They were captives in what is normally a sanctuary, forced to watch this prelude to violence, afraid to extinguish the fire, or to resist. Selective time, place and manner restrictions have been upheld when the speaker intrudes on the privacy of the home, *Rowan v. Post Office Department*, 397 U.S. 728 (1970), or where it is impractical for a captive audience to avoid exposure. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Thus, under the *O'Brien* test, the ordinance is a valid regulation of conduct because it is intended to further substantial and important governmental interests.

CONCLUSION

St. Paul Ordinance Section 292.02 is constitutional, both facially and as applied. The ordinance has been narrowly construed by the Minnesota Supreme Court to proscribe only conduct which is not protected by the First Amendment. Amici Curiae, City of Minneapolis, City of St. Paul, and the League of Minnesota Cities support such an interpretation. For the aforementioned reasons, we respectfully request that the opinion of the Minnesota Supreme Court be affirmed and that St. Paul Ordinance Section 292.02 be declared constitutional as proscribing conduct which itself injuries or tends to incite immediate violence, or which is directed, and is likely, to produce imminent lawless action.

Respectfully submitted,

Carla J. Heyl
Counsel of Record
League of Minnesota Cities
183 University Avenue East
St. Paul, MN 55101
(612) 227-5600

Counsel for Amici Curiae

FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

(19)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R.A.V.,
Petitioner,
v.
ST. PAUL, MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

MICHAEL J. WAHOSKE
MARK B. ROTENBERG
JOHN B. ORENSTEIN
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2600
Of Counsel

RICHARD RUDA *
Chief Counsel
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the First Amendment bars the prosecution of an individual for burning a cross on the lawn of a black family's home in the middle of the night under a city ordinance that has been authoritatively construed by the State's highest court to prohibit only expressive conduct that inflicts injury or tends to incite immediate violence, or is directed to inciting imminent lawless action.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE MINNESOTA SUPREME COURT'S INTERPRETATION OF THE ST. PAUL ORDINANCE IS BINDING ON THIS COURT	4
II. THE ST. PAUL ORDINANCE, AS LIMITED TO "FIGHTING WORDS" AND INCITEMENT TO IMMINENT LAWLESS ACTION, IS CONSTITUTIONAL	6
A. The Definition of "Fighting Words"	7
B. The "Fighting Words" Construction Is Neither Overbroad Nor Unconstitutionally Vague	13
C. The Ordinance As Construed Is Not Unconstitutionally Narrow	15
III. PETITIONER'S BURNING OF A CROSS ON A BLACK FAMILY'S LAWN IS A CLEAR INSTANCE OF "FIGHTING WORDS" PROSCRIBED BY THE ORDINANCE	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456 (1991) 16
Beauharnais v. Illinois, 343 U.S. 250 (1952) ..... *passim*
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 7
Brandenburg v. Ohio, 395 U.S. 444 (1969) ..... *passim*
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 13
Cantwell v. Connecticut, 310 U.S. 296 (1940) ..... *passim*
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ..... *passim*
Cohen v. California, 403 U.S. 15 (1971) 10
Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) 11
City of Houston v. Hill, 482 U.S. 451 (1987) 8, 13
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 16, 17
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 6
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) .. 9, 16
Fox v. Washington, 236 U.S. 273 (1915) 4
Frisby v. Schultz, 487 U.S. 474 (1988) 14
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .. 9
Gooding v. Wilson, 405 U.S. 518 (1972) ..... *passim*
Grayned v. City of Rockford, 408 U.S. 104 (1972) .. 15
Hess v. Indiana, 414 U.S. 105 (1973) 10
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 7
Lewis v. City of New Orleans, 415 U.S. 130 (1974) 8, 9, 13
Miller v. California, 413 U.S. 15 (1973) 7
Morley v. Lake Shore and Mich. S. Rwy. Co., 146 U.S. 162 (1892) 4, 5
Olsen v. Smith, 195 U.S. 332 (1904) 5
Papish v. Board of Curators, 410 U.S. 667 (1973) .. 10
Rosenfeld v. New Jersey, 408 U.S. 901 (1972) 10
Screws v. United States, 325 U.S. 91 (1945) 14
Spraigue v. Thompson, 118 U.S. 90 (1886) 5
State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941) 9, 10, 11

TABLE OF AUTHORITIES—Continued

Page

State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) 12
Texas v. Johnson, 491 U.S. 397 (1989) 8-9, 10, 11
United States v. Ragen, 314 U.S. 513 (1942) 14
United States v. Thirty-seven Photographs, 402 U.S. 363 (1971) 5
Virginia v. American Bookseller's Ass'n, 484 U.S. 383 (1988) 5
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1977) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I ..... *passim*
28 U.S.C. § 1257 4
Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) 17

LEGISLATIVE MATERIAL

Hate Crimes Statistics Act of 1988: Hearings on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. (1988) 17

MISCELLANEOUS

Anti-Defamation League Law Report (Spring/Summer 1988 & 1990 supp.) 2
Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42 (1982) 12
Restatement of Torts § 46 (Supp. 1948) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-7675

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations

and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

State and local governments have primary responsibility for enacting laws prohibiting conduct that inflicts injury or incites violence. This case concerns the constitutionality of a city ordinance that proscribes certain expressive conduct that constitutes "fighting words." Numerous States and local governments have enacted comparable legislation. *See Anti-Defamation League Law Report* (Spring/Summer 1988 & 1990 supp.). *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

1. The Minnesota Supreme Court's interpretation of the St. Paul ordinance is authoritative and conclusive. Construction of a state statute does not present a federal question, and this Court has repeatedly declined to review a state court construction of state or local legislation. What is at issue in this case, therefore, is the validity of the St. Paul ordinance as it has been construed by the Minnesota Supreme Court.

2. The Minnesota Supreme Court's narrowing construction of the St. Paul ordinance to apply only to "fighting words" and words " 'directed to inciting or producing imminent lawless action' " is constitutional. This Court has long recognized "fighting words" as an unprotected category of speech and has defined "insulting or 'fighting' words" as "those which by their very utterance inflict injury or tend

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Such expressive conduct is unprotected because it is targeted at a particular victim and does not in any sense communicate information or opinion safeguarded by the Constitution.

The "fighting words" construction by the Minnesota Supreme Court is, moreover, neither overbroad nor vague. This Court has repeatedly said that state courts can repair overbroad statutes by judicially limiting them to "fighting words." The Minnesota Supreme Court has limited the St. Paul ordinance by expressly adopting the definition of "fighting words" set forth in *Chaplinsky*.

Limiting the ordinance to particular types of "fighting words" does not make it unconstitutionally narrow. "Fighting words" is an unprotected category of speech. There can be no First Amendment violation in addressing problems caused by a subcategory of speech that has no First Amendment protection. Even if there could be a constitutional infirmity in addressing some "fighting words" differently than others, the St. Paul ordinance has, in a viewpoint neutral way, properly singled out "fighting words" with particularly severe and widespread social consequences. Moreover, the ordinance as interpreted requires elements of context and targeting to show that covered speech constitutes unprotected fighting words.

3. Petitioner's burning of a cross on a black family's lawn in the middle of the night is a clear instance of fighting words properly proscribed by the St. Paul ordinance. It is the type of conduct that could provoke a reasonable person to respond violently. It is also a personal assault upon a particular family, and as such it has no First Amendment protection.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S INTERPRETATION OF THE ST. PAUL ORDINANCE IS BINDING ON THIS COURT.

The Minnesota Supreme Court limited the scope of the St. Paul ordinance to "fighting words" and words directed to inciting imminent lawless action—two well-recognized categories of speech unprotected by the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Minnesota Supreme Court thereby properly narrowed the ordinance to "avoid doubtful constitutional questions." *Fox v. Washington*, 236 U.S. 273, 277 (1915) (Holmes, J.).

Petitioner contends that the Minnesota court's narrowing construction should not be respected here. *See* Pet. Br. 22-26.[2] The law, however, has been settled for at least a century that "[t]he meaning of a state statute, declared by the highest court of a State, is conclusive upon this court." *Morley v. Lake Shore and Mich. S. Rwy. Co.*, 146 U.S. 162, 167 (1892). Basic principles of federalism, and this Court's limited statutory jurisdiction over state court decisions (now codified at 28 U.S.C. § 1257 (1988)), preclude this Court from reexamining the meaning of a state or local law. The meaning of a state statute or local ordinance is not a federal question:

> If, then, the law as enacted by the legislature, and construed by the state judiciary, will be the

[2] *Amici* supporting Petitioner, however, acknowledge that the Minnesota Supreme Court's "interpretation of state law is authoritive and must be accepted by this Court." Br. Am. Cur. ACLU *et al.* 11-12 (citations omitted). *See also* Br. Am. Cur. Ass'n of Am. Publ. 14.

> law of the State, it follows that, as to the proper construction of the statute and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the State was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the Constitution and judiciary act, subject to investigation here. Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself, as construed by the state court.

Morley, 146 U.S. at 167. *See also Gooding v. Wilson*, 405 U.S. 518, 520 (1972) (Court " 'lack[s] jurisdiction authoritatively to construe state legislation' ") (quoting *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971)).

The Court long ago rejected the argument that it could disregard a state court interpretation of a statute that allegedly "caused the statute 'to enact what confessedly the legislature never meant.' " *Olsen v. Smith*, 195 U.S. 332, 342 (1904) (quoting *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)). Although Petitioner apparently attempts to resurrect that discredited argument here, the cases he cites underscore the conclusive respect that this Court gives to state court constructions of state law. In *Virginia v. American Bookseller's Ass'n*, 484 U.S. 383 (1988), cited in Pet. Br. 22, the Court held that *it* would not "rewrite a [Virginia] state law to conform it to constitutional requirements," 484 U.S. at 397, but instead certified the questions of statutory interpre-

tation to the Virginia Supreme Court. *See id.* at 398. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court did not "refuse to apply a narrowing construction even when one appeared available," as Petitioner contends (Pet. Br. at 23), but rather observed that it saw no possible limiting construction and that the state courts had supplied none. 422 U.S. at 216.

The issue in this case, then, is not whether the Minnesota Supreme Court could narrow the scope of the St. Paul ordinance as it did. The issue is whether the ordinance, as authoritatively limited to two specific categories of unprotected speech, violates the First Amendment.

II. THE ST. PAUL ORDINANCE, AS LIMITED TO "FIGHTING WORDS" AND INCITEMENT TO IMMINENT LAWLESS ACTION, IS CONSTITUTIONAL.

The Minnesota Supreme Court based its narrowing construction of the St. Paul ordinance on two separate doctrines. One is the "fighting words" doctrine first articulated in *Chaplinsky*. As the Minnesota court observed, the Constitution does not protect "expressive conduct that amounts to 'fighting words'—conduct that itself inflicts injury or tends to incite immediate violence." Pet. App. A-4 (*In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)) (citing *Chaplinsky*, 315 U.S. at 572). The Minnesota court further held that the ordinance "is also . . . constitutional to the extent it prohibits conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" Pet. App. A-4 (464 N.W.2d at 510) (quoting *Brandenburg*, 395 U.S. at 447).

This is a "fighting words" case. The St. Paul ordinance has been applied to expressive conduct the clear intent of which was to inflict injury on a particular victim or to incite a violent response.[3] *Amici* submit that the Minnesota court's express limitation of the ordinance to this category of conduct—clearly unprotected under this Court's precedents—is dispositive of the constitutionality of the ordinance. However, because the scope of the "fighting words" doctrine is at the heart of this case, it will be examined here in more detail.

A. The Definition of "Fighting Words."

Ever since *Chaplinsky v. New Hampshire*, the Court has identified "fighting words" as a category of unprotected speech; other categories include libel, incitement to riot, obscenity, and child pornography. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984). Not all categories of unprotected expression have been easy to define. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (obscenity). "Fighting words," however, were described from the outset in a classic formulation repeatedly invoked in subsequent cases:

> insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

[3] Petitioner's act of burning a cross on the lawn of a black family in the dead of night, whatever else may be said about it, apparently was not done under circumstances where third parties could have been incited to riot. Thus the "incitement to imminent lawless action" proscription of the ordinance is not at issue here—although prohibiting expression of this type plainly raises no constitutional concerns. *See Brandenburg*, 395 U.S. at 447.

Chaplinsky, 315 U.S. at 572. *See also City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (citing *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)). This is the very definition used by the Minnesota Supreme Court. *See* Pet. App. A-4 (464 N.W.2d at 510) (citing *Chaplinsky*, 315 U.S. at 572).

This Court has reaffirmed its adherence to the *Chaplinsky* definition of "fighting words" in a recent line of cases, beginning with *Gooding v. Wilson*, 405 U.S. 518 (1972). In *Lewis*, an ordinance prohibited the use of "opprobrious" language "toward or with reference to" a police officer in the performance of his duties. 415 U.S. at 132. The Court measured the overbreadth of the ordinance by its failure to comply with *Chaplinsky*: it "plainly has a broader sweep than the constitutional definition of 'fighting words' announced in [*Chaplinsky*] and reaffirmed in [*Gooding*], namely, 'those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Id.* (quoting *Chaplinsky*, 315 U.S. at 572). In *City of Houston v. Hill*, 482 U.S. 451 (1987), the Court invalidated a Houston ordinance similar to the ordinance in *Lewis*, phrased in terms of "interrupt[ing] any policeman in the execution of his duty." 482 U.S. at 455. Explaining *Lewis* the Court said,

> Critical to our decision was the fact that the ordinance . . . was not limited in scope to fighting words that " 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' "

Id. at 461-62 (quoting *Lewis*, 415 U.S. at 133, quoting *Gooding*, 405 U.S. at 525). *See also Texas v. Johnson*, 491 U.S. 397, 409 (1989) (expressive conduct protected where it could not reasonably be regarded as "a direct personal insult or an invitation to exchange fisticuffs") (collecting cases). While each of these cases reaffirmed the *Chaplinsky* definition of fighting words, none of them elaborated on what this formulation means. For that, one must turn back to *Chaplinsky* itself.

The defendant in *Chaplinsky* was prosecuted for calling the complainant a "damned racketeer" and a "damned Fascist." The New Hampshire court considered these to be words that would have been "likely to cause an average addressee to fight." *See* 315 U.S. at 573 (quoting *State v. Chaplinsky*, 91 N.H. 310, 320, 18 A.2d 754, 762 (1941)). This Court did not disagree, but went on to address the underlying issue of why "insulting or 'fighting' words" should fall outside the scope of the First Amendment:

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

315 U.S. at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940)). This classic analysis has since served as a touchstone for isolating categories of unprotected speech. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 746 (1978); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Lewis*, 415 U.S. at 140-41 (Blackmun, J., dissenting);

Papish v. Board of Curators, 410 U.S. 667, 676 (1973) (Rehnquist, J., dissenting); *Rosenfeld v. New Jersey*, 408 U.S. 901, 903-04 (1972) (Powell, J., dissenting).

The category of unprotected expression defined by the *Chaplinsky* formulation is not limited to speech or expressive conduct likely to provoke a violent reaction. It encompasses expression that amounts to no more than the hurling of a verbal rock: a targeted assault having only a marginal relationship to any exposition of ideas. As the Court indicated in *Chaplinsky*, the character of this speech is "not to be defined in terms of a what a particular addressee thinks . . . The test is what men of common intelligence would understand." 315 U.S. at 573 (quoting 91 N.H. at 320, 18 A.2d at 762). The *Chaplinsky* formulation thus does not turn on the individual victim's reaction to verbal abuse; rather, the focus is on how the expression would be perceived by a reasonable person. *See* 315 U.S. at 573. *See also Texas v. Johnson*, 491 U.S. at 409 (expressive conduct not unprotected fighting words where "[n]o reasonable onlooker" would have so regarded it).

Of course, *Chaplinsky* does not place all insulting speech outside First Amendment boundaries. Essential to "insulting or 'fighting' words" under *Chaplinsky* and subsequent cases is their targeted nature: they must be directed to a particular victim. Thus, in *Hess v. Indiana*, 414 U.S. 105 (1973), a campus demonstrator who shouted to no one in particular "We'll take the fucking street later" did not utter fighting words. 414 U.S. at 107. Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), the words "Fuck the Draft" on the defendant's jacket were not " 'directed to the person of the hearer,' " 403 U.S. at 20

(quoting *Cantwell*, 310 U.S. at 309), and could not reasonably have been taken as "a direct personal insult" by anyone. 403 U.S. at 20. Clearly, "fighting words" is not synonymous with public vulgarity or inflammatory rhetoric; at the very least, it requires a targeted victim.[4] That is a principal reason why *Texas v. Johnson*, 491 U.S. 397 (1989), heavily relied on by Petitioner, has no application here. The statute in *Johnson* banned flag burning under all circumstances. *See* 491 U.S. at 400 n.1.

The context in which the utterance is made is an integral part of the "fighting words" analysis. The New Hampshire court in *Chaplinsky* alluded to this when it noted that some offensive words, when said with "a disarming smile", might not be "fighting words." 91 N.H. at 320, 18 A.2d at 762. "Damned Fascist," for example, apparently was an insult that amounted to "fighting words" in New Hampshire in 1940. Similarly, in 1991, burning a cross on a black person's lawn in St. Paul in the middle of the night surely would be understood by a reasonable person as intended to inflict injury upon that person. *See generally Beauharnais v. Illinois*, 343 U.S. 250, 258-59 (1952).

Moreover, words that "by [their] very utterance inflict injury" are not just "fighting words" unprotected by the Constitution; they are also widely con-

---

[4] Under the Minnesota court's construction, even swastikas and burning crosses, expressly referred to in the St. Paul ordinance, are proscribed only if they meet the individualized targeting requirement of "fighting words." Accordingly, Nazis marching with swastikas in Skokie, Illinois do not thereby necessarily utter "fighting words." *See Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (holding this activity protected), *cert. denied*, 439 U.S. 916 (1978).

sidered a basis for civil liability. A majority of states has recognized that certain expressive activity amounting to a deliberate campaign to inflict severe emotional distress upon a victim is a civil wrong. *See* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 43 (1982). *See also State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 337-38, 240 P.2d 282, 286 (1952) (Traynor, J.) (describing right to be "free from serious, intentional, and unprivileged invasions of mental and emotional tranquility"). Since 1948 the Restatement of the Law of Torts has provided that severe emotional distress directly caused by wanton or outrageous conduct is compensable at law. *Restatement of Torts* § 46 (Supp. 1948). To truncate the "fighting words" doctrine after half a century would call into question the States' power to provide a means of redress for expressive actions that "by their very utterance inflict injury."

This case, of course, does not focus on civil liability for inflicting severe emotional distress, nor is it about punishing "hate speech"—expression that falls outside what current societal norms may consider to be "politically correct." This case is about the authority of States and local governments to legislate against conduct targeted at particular individuals that not only is not an "exposition of ideas," but by its very nature inflicts injury or tends to incite immediate violence. Because this sort of injurious expression falls outside the First Amendment, States and local governments have authority to legislate against it.

B. The "Fighting Words" Construction Is Neither Overbroad Nor Unconstitutionally Vague.

In limiting the scope of the St. Paul ordinance to "fighting words," the Minnesota Supreme Court did precisely what this Court has repeatedly invited state courts to do. In *Chaplinsky*, a state statute far broader than the St. Paul ordinance was upheld by virtue of the state supreme court's narrowing construction. *See* 315 U.S. at 572-73. *See also Beauharnais*, 343 U.S. at 253. In *Gooding v. Wilson*, *Lewis v. City of New Orleans*, and *City of Houston v. Hill*, convictions under statutes and ordinances that punished speech were reversed because those statutes and ordinances had not been judicially limited to "fighting words."[5] *See Gooding*, 405 U.S. at 525; *Lewis*, 415 U.S. at 134; *Houston*, 482 U.S. at 462. Here, the Minnesota Supreme Court has properly narrowed the St. Paul ordinance, utilizing First Amendment doctrines articulated by this Court. As construed, the St. Paul ordinance is considerably narrower than the statutes and ordinances at issue in *Chaplinsky*, *Gooding*, *Lewis*, and *Hill*. Unlike those statutes and ordinances, the St. Paul ordinance is exclusively directed to conduct—not the spoken word. While this feature of the ordinance in itself does not remove it from the purview of the First Amendment, it drastically limits any potential overbreadth. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial

[5] In *Lewis*, although the lower court had used the term "fighting words," it was evident that the court was not defining the term in accordance with *Chaplinsky* and reversal therefore was required. *See* 415 U.S. at 132.

as well, judged in relation to the statute's plainly legitimate sweep").

Petitioner's vagueness challenge fails for the same reasons. It cannot be the case that a formulation repeatedly utilized by this Court runs afoul of the vagueness doctrine—and certainly not when the ordinance is limited by express incorporation of that formulation. This is far from the case of a statute that literally declares "all fighting words" to be criminal, leaving potential offenders to guess at what they may and may not say. This ordinance, as construed, applies to certain clearly identified conduct specifically targeted at an individual victim based on his or her race, gender, or religion. *Cf. Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (sustaining ordinance prohibiting "focused picketing" outside of residences). An individual acting with the specific intent that such activity would require—that is, the specific intent to inflict injury upon a particular person or incite a violent reaction—could not be in doubt that his or her conduct would violate this ordinance. There is therefore no "trap" here "for those who act in good faith." *United States v. Ragen*, 314 U.S. 513, 524 (1942). "Fighting words" necessarily are directed at a person willfully, and the element of willfulness disposes of any vagueness question. *See Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion).

In fact, it is not clear that an ordinance directed at the sort of activity involved here *could* reasonably be more specific. The inherent limitations in the "fighting words" doctrine, the required bases of the acts that the ordinance prohibits (*i.e.*, acts based on race, religion, creed, color, or gender), and the limitation to acts of placement on property, together

make reasonably clear what conduct the ordinance is intended to address. Short of listing more examples of prohibited conduct—a list that would inevitably be incomplete and is not constitutionally required [6]—it is difficult to see what else the City of St. Paul and the Minnesota Supreme Court could have done.

C. The Ordinance As Construed Is Not Unconstitutionally Narrow.

Petitioner and *amici* supporting Petitioner argue that it is unconstitutional to single out for special criminal treatment the particular types of fighting words covered by the St. Paul ordinance, that is, nonoral expression related to "race, color, creed, religion or gender" that constitutes "fighting words."

The flaw in the argument lies in the fact that the ordinance applies to a sub-class of a category of *unprotected* speech.[7] There can be no First Amendment violation in government's tailoring its response to a particularly harmful or prevalent sub-class of conduct that has no First Amendment protection—it is sufficient that the ordinance be rationally directed at furthering a legitimate state purpose. *See Beauharnais*, 343 U.S. at 258-259, 261, 263, 267 (given legitimate legislative purpose of preventing racial violence caused by unprotected speech, it was outside

---

[6] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (upholding an ordinance characterized by "flexibility and reasonable breadth, rather than meticulous specificity," because, as construed by the Illinois Supreme Court, the ordinance gave "fair notice to those to whom it [is] directed").

[7] None of the cases cited by *amicus* Center for Individual Rights ("CIR"), Br. at 11-12, are to the contrary. In none of them was the issue the state's right to distinguish among categories of *unprotected* speech.

Court's authority to pass on "wisdom or efficacy" of means chosen). The test is easily met here. The ordinance reflects concern about the effects of virulent, individually targeted symbolic expressions concerning race, gender, or religion. There is no question that such expression may be rationally identified by the legislature as more likely than other types of speech to inflict injury or incite violence. *Cf. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456, 2470 (1991) (Souter, J., concurring) ("secondary effects" of nude dancing justify ban); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (effects of adult theaters on localities justified ordinance treating them differently from other theaters). An ordinance proscribing *fighting words* of this variety rationally addresses this problem within the bounds that the First Amendment permits.

Even if it were possible to violate the First Amendment by singling out only certain "fighting words" for particularized treatment, there would be no violation here. First, the St. Paul ordinance as construed does not proscribe only anti-black conduct as opposed to anti-white conduct, or only anti-female as opposed to anti-male; rather, it punishes conduct relating to race or gender *whatever* the viewpoint of the speaker, so long as that conduct otherwise meets the "fighting words" criteria. The ordinance is thus viewpoint neutral. *Cf. FCC v. Pacifica Foundation*, 438 U.S. at 745-46 ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas").[8]

[8] *Amicus Curiae* CIR repeatedly implies that the St. Paul ordinance is improperly "viewpoint-based." *See, e.g.*, Br. Am. Cur. CIR at 10. CIR is incorrect. For example, CIR erroneously asserts that "symbols of religious harmony apparently are not reached by the regulation, nor are symbols of racial or gender equality or pride." *Id.* at 9 & n.7. Nothing in the ordinance, however, either as written or construed, prevents punishment of the use of any symbol to inflict immediate injury or incite an immediate breach of the peace.

Moreover, "even within the area of protected speech, a difference in content may require a different governmental response." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1977) (plurality opinion). Here, outside the area of any protected speech, it is surely equally appropriate for a local government to focus its response against a particular sort of activity believed by it to have the greatest potential for inflicting injury or inciting violence.[9] Legislatures are free to direct their responses against those forms of unprotected expressive conduct most likely to produce harm. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52-53 (1986). "'[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *Id.* (quoting *Young v. American Mini Theatres*, 427 U.S. at 71).

The St. Paul ordinance addresses an aspect of "fighting words" and incitement to violence that, in

[9] Bias-motivated crimes are an increasing national problem. *See Hate Crime Statistics Act of 1988: Hearings on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 20 (1988) (statement of Sen. Metzenbaum) (noting that more "hate crimes" had been committed in previous 3 years than in prior 20 years). In response, Congress recently enacted the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990), requiring the Attorney General to collect and publish nationwide data on crimes that manifest evidence of prejudice against race or religion.

the judgment of the legislature, presents a most serious social problem: conduct that inflicts injury or tends to incite an immediate breach of the peace "on the basis of race, color, creed, religion, or gender." St. Paul City Ordinance § 292.02. While it is not permissible to punish expression merely because the majority does not agree with it or is offended by it, surely it is permissible for the legislature to make a judgment regarding the kind of conduct that is most likely to lead to violence and disorder. In the words of a unanimous Court:

> There are limits to the exercise of these liberties [of speech and of the press]. The danger in these terms from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

Cantwell, 310 U.S. at 310. If the public is to be protected from threats and intimidation, the legislature must be given the latitude to direct its response against that conduct most likely to cause injury; it is not constitutionally required simultaneously to legislate specifically against every hypothetical or imaginable kind of conduct. Speaking for the Court in upholding a state statute that punished racial and religious defamation, Justice Frankfurter stated:

> It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power.

Beauharnais, 343 U.S. at 261-62 (footnote omitted).

III. PETITIONER'S BURNING OF A CROSS ON A BLACK FAMILY'S LAWN IS A CLEAR INSTANCE OF "FIGHTING WORDS" PROSCRIBED BY THE ORDINANCE.

Petitioner's burning of a cross on a black family's lawn is clearly proscribed under the plain meaning of the St. Paul ordinance. It is alleged that Petitioner went to a black family's home in the middle of the night and deliberately placed a burning cross on the lawn for the purpose of intimidating the family on the basis of race. *See* Br. Am. Cur. ACLU at 2-3.

Under the Minnesota Supreme Court's limiting construction of the ordinance, Petitioner's conduct clearly amounts to "fighting words." Placing a burning cross on a black family's lawn in the middle of the night is conduct intended by its "very utterance" to inflict injury or incite violence. It is just this sort of "epithets or personal abuse" which this Court singled out in *Chaplinsky*:

> "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

315 U.S. at 572 (quoting *Cantwell*, 310 U.S. at 309-310).

The context of Petitioner's conduct confirms this conclusion. Given the historical experience of African Americans, a burning cross targeted at a black family is an unmistakably graphic threat. *Chaplinsky* expressly held that expressions that personally threaten are constitutionally unprotected. It declared that States could prohibit "disorderly words, including profanity, obscenity and *threats*." 315 U.S. at 573 (emphasis added). Terroristic conduct such as this can find no protection in the Constitution.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

MICHAEL J. WAHOSKE
MARK B. ROTENBERG
JOHN B. ORENSTEIN
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2600
Of Counsel

RICHARD RUDA *
Chief Counsel
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

August 23, 1991

No. 90-7675

FILED
AUG 23 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE CLARENDON FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Of Counsel:
DENNIS C. HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 486-9191

KEMP R. HARSHMAN
THE CLARENDON FOUNDATION
Suite 826
4201 S. 31st Street
Arlington, Virginia 22206
(202) 653-7451

RONALD D. MAINES *
JONES, WALDO, HOLBROOK & MCDONOUGH, P.C.
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037
(202) 296-5950
Attorney for Amici Curiae National Association for the Advancement of Colored People and The Clarendon Foundation

* Counsel of Record

August 23, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE BURNING OF A CROSS ON THE PRIVATE PROPERTY OF A BLACK FAMILY IS NOT CONSTITUTIONALLY PROTECTED SPEECH	4
A. The Conduct At Issue In This Case Lacks The Elements of Genuine Expression	4
B. Other Significant Social Values Affect the Assessment of Petitioner's Conduct	7
II. PETITIONER'S RELIANCE UPON THE OVERBREADTH DOCTRINE IS MISPLACED	8
A. Introduction	8
B. This Court Should Reassess the Overbreadth Doctrine	10
C. The Minnesota State Supreme Court Provided A Properly Limited Interpretation of Section 292.02	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	13
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985)	13
Cantwell v. Connecticut, 310 U.S. 296 (1940)	5
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	5, 11
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)	9
Cohen v. California, 403 U.S. 15 (1971)	6
Coz v. New Hampshire, 312 U.S. 569 (1941)	8
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	6, 9
Gooding v. Wilson, 405 U.S. 518 (1972)	10, 11
In the Matter of the Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991)	9, 13
Lewis v. New Orleans, 415 U.S. 130 (1974)	10, 11
New York v. Ferber, 458 U.S. 747 (1982)	6, 9
Rosenfeld v. New Jersey, 408 U.S. 901 (1972)	11
Terminiello v. City of Chicago, 337 U.S. 1 (1949)	4, 8
Thornhill v. Alabama, 310 U.S. 88 (1940)	12
Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	12
Wainwright v. Stone, 414 U.S. 21 (1973)	9
Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976)	9

OTHER SOURCES:

Bickel, A.M., THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS (1962)	11
Frankfurter, F., "Advisory Opinions" in ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1930)	11
Mill, J.S., ON LIBERTY (A. Castell ed. 1947)	7
Plato, "The Sophist," in PLATO: THE COLLECTED DIALOGUES (E. Hamilton, H. Cairns eds. 1961)	14
Tribe, L., AMERICAN CONSTITUTIONAL LAW (2d ed. 1988)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-7675

R.A.V.,

Petitioner,

v.

ST. PAUL, MINNESOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE CLARENDON FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

Pursuant to Rule 37 of this Court, the National Association for the Advancement of Colored People ("NAACP") and The Clarendon Foundation respectfully submit this brief amici curiae in support of Respondent, City of St. Paul, Minnesota. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The NAACP is a non-profit corporation with substantial membership nationwide. The NAACP has sought throughout its history to promote goodwill and mutual understanding among all Americans and to combat racial hatred and racially motivated violence. Since formation of the Ku Klux Klan shortly after the American Civil

War, the "burning cross" has been an integral part of white supremacist intimidation tactics and terroristic acts. The NAACP's fight against the commission of such acts is legendary and the organization has played a pivotal role in thwarting conduct of this nature.

Recently, however, there has been a resurgence in bias-motivated acts of intimidation and terrorism against blacks and other racial and ethnic minorities. Ordinances prohibiting bias-motivated disorderly conduct are necessary if efforts to combat racial violence against minorities are to continue successfully.

The Clarendon Foundation is a non-profit, non-partisan legal foundation concerned with significant legal issues related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The Foundation participates in various forums in cases where the resolution of constitutional issues may be aided by philosophical and historical analyses in addition to case law and public policy considerations. The Clarendon Foundation is committed to an on-going review of the basic tenets of our constitutional government, in the spirit of George Mason's admonition that ". . . no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principles."

The instant case raises questions of paramount significance to the public interest. We believe the perspective of the NAACP and The Clarendon Foundation will complement Respondent's brief and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

The wise resolution of this case, whatever the contours of its constitutional dimension may be, requires that it not be divorced from the concrete facts which underlie it. Distilled to its factual core, this case is about a young white man who, with his cohorts, burned a cross under

cover of darkness on the front lawn of the only black family in his neighborhood.

In his brief, Petitioner intones principles of freedom of speech with which, in the abstract, no one will disagree. But the State of Minnesota was not indulging in theory when it charged Petitioner with a violation of the ordinance in controversy. It was dealing with what can only fairly be described as an act of terrorism. This conduct cannot rationally be viewed as protected by the First Amendment.

The malicious cross burning at the core of this case is "expressive conduct" only in the most perverse sense of that fundamental idea. Such activity is unprotected because (1) it is not a genuine expression of opinion and (2) it is wholly at odds with other social values which must be considered in any thoughtful analysis of civil liberties, including the right of free speech.

St. Paul City Ordinance Section 292.02 plainly includes within its scope the cross burning on the lawn of the complainant, and thus proscribes a constitutionally regulable act. Application of the overbreadth doctrine, which is the sole predicate of Petitioner's appeal, would work an injustice by infringing upon the complainant's own civil liberty. Petitioner's interpretation of the specific facts of this case expands that doctrine to an illogical extreme and does not provide a sufficient ground for overturning the ordinance.

Nevertheless, consistent with the structure of current overbreadth analysis, the Minnesota state supreme court provided an adequate construction of Section 292.02 in upholding its constitutionality. Because the ordinance expressly regulates cross burning on private property and the proscription of that specific conduct is lawful, there is a core of constitutionally regulable conduct to which the ordinance may be narrowed.

The Petitioner has asked the Court not to create any new exceptions to the First Amendment protection of free speech. We ask that the Court not legitimize political and religious persecution by making it a constitutional right.

ARGUMENT

I. THE BURNING OF A CROSS ON THE PRIVATE PROPERTY OF A BLACK FAMILY IS NOT CONSTITUTIONALLY PROTECTED SPEECH

Creating an exception to the First Amendment for a case in which the listener might be seriously offended by certain expression is problematic because it is indistinguishable in principle from cases of protected speech. While taking many offensive forms, for example, expression that "invite[s] dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger," has properly been protected from regulation by the government. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

Nevertheless, principles derived over time for differentiating protected from unprotected expression make clear that the ill conduct involved in this case falls squarely outside the protected zone. The circumstances in which certain activities are viewed as unprotected speech may be analyzed along two dimensions: (1) the extent to which the speech or conduct actually contains elements of *bona fide* "expression," and (2) whether other significant social values are implicated.

A. The Conduct At Issue In This Case Lacks The Elements of Genuine Expression

Free speech has value only in the context of dialogue. Communication that concerns beliefs and ideas, and involves persuasion is the legitimate concern of the First Amendment. The law has traditionally treated as unprotected those types of "utterances [that] are no essential

part of any exposition of ideas [and] of . . . slight social value as a step to truth." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

Unprotected expression includes misrepresentations, "fighting words," obscenity, and libelous statements.[1] *Id.* at 571-72. Such expressions are properly viewed, in the words of one observer, as "projectiles" whose ill effects cannot be averted by more speech, rather than as part of an exchange of views. L. Tribe, AMERICAN CONSTITUTIONAL LAW 837 (2d ed. 1988). These are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572.

In assessing a regulation of expression, the law has generally taken into account the harmfulness of the types of messages being conveyed, and the ability or inability of more speech to cure the harm. For instance, advocacy of "imminent lawless action" is unprotected in large part because such speech may result in a crime before other speakers have had a chance to respond. This distinction between protected and unprotected speech is summarized in a now famous statement from *Cantwell v. Connecticut*, 310 U.S. 296 (1940) where the Court observed:

> Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Id. at 309-10.

---

[1] Petitioner relies upon recent flag burning cases and rejects the relevancy of the "fighting words" theory to this case. It should be obvious, however, that flags are burned to attack political ideas—ideas espoused by political leaders or political parties. Flag burning is a distinctly political demonstration. Crosses are burned to terrorize and intimidate others. The "fighting words" doctrine is relevant to this case because it addresses attacks upon individuals, rather than ideas.

Moreover, it is well established that the government may, without running afoul of the First Amendment, protect targeted listeners from offensive speech when the speaker intrudes on the privacy of the home, or even where a "captive audience" cannot otherwise practically avoid exposure. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). In other words, the government's ability to "shut off discourse solely to protect others from hearing it depends upon a showing that *substantial privacy interests are being invaded in an essentially intolerable manner.*" *Cohen v. California*, 403 U.S. 15, 21 (1971) (emphasis added).

The burning of a cross on the lawn of a black family late at night is a classic instance of the type of conduct which may be constitutionally regulated under these limiting principles. A cross burning executed in this manner is not the exposition of an idea, but a wanton and volatile act intended to terrorize an innocent family. It is difficult to conceive of an activity that more substantially and flagrantly invades one's privacy in "an essentially intolerable manner." *Cohen*, 403 U.S. at 21-22.

Persecution of minorities is no more a type of political opinion to be accorded free speech protection, than pornography is to be considered a form of protected artistic expression. Supremacist speech and other forms of persecution are no less harmful to the community than is pornography. Both undermine basic human dignity. *See New York v. Ferber*, 458 U.S. 747 (1982).

Accordingly, the conduct in question cannot be viewed as constitutionally protected speech. The principles of civil liberty invoked by Petitioner, for all their cherished value in other contexts, are simply not applicable to this conduct. Inasmuch as Section 292.02 plainly proscribes this conduct, it is a valid regulation to that extent.

B. Other Significant Social Values Affect the Assessment of Petitioner's Conduct

Even if it were reasonable to consider the cross burning in this case as marginally expressive conduct, it is not an activity which the state is required to indulge for the sake exclusively of Petitioner's right to free speech. Petitioner impliedly views this interest as categorically superior to other social values, as if these values must be relegated to lesser status if Petitioner's civil liberty is not to be unlawfully compromised.

This is a false dynamic. One need look no further than John Stuart Mill, one of the staunchest defenders of civil liberties, to find the crucial theoretical distinction missing from Petitioner's analytical approach. Civil liberty as mere *license*, which Mill condemned, indiscriminately includes intolerable forms of behavior where liberty becomes a *carte blanche* for a person to act as he pleases. In contrast is the ideal of civil liberty as *independence*, or the right to express one's individuality without fear of governmental sanction. Liberty as license is one-sided, ignoring the effects of one person's actions upon the well-being of others. Liberty as independence, by comparison, necessarily implies that the individuality of others must always be afforded equal protection and concern. As Mill succinctly put it, "It is desirable, . . . that in things which do not primarily concern others, individuality should assert itself." J.S. Mill, ON LIBERTY 56 (A. Castell ed. 1947).

Social values such as the dignity of individuals, public safety or civil peace and order are considerations which may influence our assessment of how and to what degree the civil liberties of all concerned are affected. Properly viewed, a law such as St. Paul Ordinance Section 292.02 does not threaten, but is necessary to protect, the political independence of victims of hate crimes. It is not mutually exclusive with Petitioner's lawful exercise of his own civil liberty.

Indeed, the Court has held that the protection of the safety and the property rights of its citizens is not only a proper subject for the exercise of a municipality's authority, but that a local government would be remiss if it did not provide these fundamental protections. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Court stated:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety . . . of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend . . . .

Id. at 574.

Petitioner implicitly embraces "a conception of freedom of speech so rigid as to tolerate no concession" to the other significant social values at stake in this case. *Terminiello*, 337 U.S. at 7 (Jackson, J., dissenting). Because this misses the essential purpose of civil liberty, Petitioner's argument for his right to free speech is fundamentally ill conceived and must fail.

II. PETITIONER'S RELIANCE UPON THE OVERBREADTH DOCTRINE IS MISPLACED

A. Introduction

The linchpin of Petitioner's brief is that Section 292.02 is unconstitutionally overbroad. Petitioner's argument is that although no constitutionally protected conduct of his own could immunize him from prosecution, the language of the ordinance must be declared inoperative because the generality of the language might result in situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so.

The First Amendment overbreadth doctrine allows a challenge to the validity of a statute on its face only if the law is "substantially" overbroad. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799-801 (1984); *New York v. Ferber*, 458 U.S. at 769-73. Nevertheless, an attack based upon overbreadth will not succeed if the statute in question is "readily subject to a narrowing construction by the state courts." *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 55 (1976); *Erznoznick v. City of Jacksonville*, 422 U.S. at 209. Moreover, "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation [the Court takes] 'the statute as though it read precisely as the highest court of the State has interpreted it.'" *Wainwright v. Stone*, 414 U.S. 21 (1973). A statute interpreted by the state court to mean something clearer or narrower than its literal language allows the state to prosecute a litigant for violation of the statute. *Cox*, 312 U.S. at 572-73.

In the view of the Minnesota state supreme court, Section 292.02 could be "narrowly interpreted to reach only unprotected conduct." *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991). The court was of the view that the ordinance should be interpreted "so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the First Amendment does not protect." *Id.* at 510-11. Accordingly, said the court, "the ordinance is a narrowly tailored means towards accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and orders." *Id.* at 511.

As discussed below, the reach of the overbreadth argument has been extended far beyond its reasonable application, and the continuing utility of the doctrine should be re-evaluated by the Court at this juncture. Nonetheless, even applying the overbreadth doctrine in its present form, Petitioner's challenge is unavailing.

B. This Court Should Reassess the Overbreadth Doctrine

Serious problems with the overbreadth doctrine were noted by several Justices of this Court nearly twenty years ago. In a series of cases in the early 1970s, the Court reversed convictions involving laws proscribing abusive language. In *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court invalidated a Georgia ordinance primarily because it had been previously applied to "utterances where there was no likelihood that the person addressed would make an immediate violent utterance." The Court in *Lewis v. New Orleans*, 415 U.S. 130 (1974), ruled that vulgar or offensive speech was protected under the First Amendment. Because the statute punished "opprobrious language," it was deemed by the state court to embrace words that do not " 'by their very utterance inflict injury or tend to invite an immediate breach of the peace.' " *Id.* at 133.

Dissenting in both cases, then-Chief Justice Burger and Justices Blackmun and Rehnquist complained that the majority invoked vagueness and overbreadth analysis

> indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing that speech.

Lewis, 415 U.S. at 137-38. In both cases, the dissenting Justices focused upon the concrete facts before the Court, warning of a reflexive reliance upon the abstract analysis inherent in overbreadth review. They complained that the majority had relegated the facts to "footnote status, conveniently distant and in less disturbing focus. This is the compulsion of a doctrine that reduces our function to parsing words in the context of imaginary events." *Lewis*, 415 U.S. at 138. Moreover, they reasoned:

> [o]verbreadth and vagueness in the field of speech have become result-oriented rubber stamps attuned to the easy and imagined self assurance that 'one man's vulgarity is another's lyric.'

Lewis, 415 U.S. at 141.

The application of the overbreadth doctrine in these cases exemplified "[t]he extreme to which we allow ourselves to be manipulated by theory extended to the end of logic." *Lewis*, 415 U.S. at 137.

In the instant case, the identified overbreadth is not incurable and would not taint all possible applications of the ordinance. The invocation of overbreadth analysis here must not be allowed to cloud the disturbing and compelling facts of this case. Petitioner's conduct was not expressive in any tolerable sense, but an act clearly intended to intimidate and terrorize.

The inherent danger of the overbreadth doctrine can be seen against the background of the rationale for the principle of standing from which the doctrine springs.

> [T]here are sound reasons for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments. 'Every tendency to deal with constitutional questions abstractly,' Professor Felix Frankfurter wrote a generation ago, 'to formulate them in terms of barren legal questions, leads to dialectics, to sterile conclusions unrelated to actualities.'[2]

A.M. Bickel, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS 115-16 (1962).

In *Gooding* and *Lewis*, Justice Powell insisted upon the importance of context in decisionmaking. Dissenting in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), he suggested that *Chaplinsky* be extended to the "willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Id.* at 906. He urged

---

[2] F. Frankfurter, "Advisory Opinions" in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 475, 478 (1930).

that whatever the scope of the "fighting words" doctrine, overbreadth analysis was inappropriate in such cases and he thought it unlikely that such statutes deter others from exercising First Amendment rights. *Id.* at 909.

The factual context of this case is the crucial element to its proper resolution. Losing sight of this specific focus will result in the expansion of current overbreadth jurisprudence to an illogical extreme. Accordingly, the Court should take this opportunity to reassess the wisdom of the overbreadth doctrine in its present formulation.

C. The Minnesota State Supreme Court Provided A Properly Limited Interpretation of Section 292.02

Petitioner asserts that the St. Paul ordinance is not susceptible to a limiting construction and, therefore, that the state supreme court's limiting gloss was *a fortiori* futile. As put by the Petitioner:

> The ordinance has no core of constitutionally proscribable conduct since it is not possible to define a precise category of expression protected by the First Amendment which can be clearly stated to fall outside the reach of this narrowly construed ordinance.

Petitioner's Brief at 6.

Petitioner relies on the line of cases exemplified by *Thornhill v. Alabama*, 310 U.S. 88 (1940), and more recently by *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Those cases held that an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face. Such a challenge is countenanced on the theory that the statute threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial," the law may not be

enforced against anyone, including the party before the court, "until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

A narrowing construction of a statute may obviate any challenge on overbreadth grounds. Interpretation of a statute by a state court may "substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985).

As discussed in Section II, the Minnesota state supreme court authoritatively construed the challenged ordinance, concluding that it "can be narrowly interpreted to reach only unprotected conduct. *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d at 509. Petitioner's act of burning a cross under cover of darkness on the complainant's private property is not expressive conduct entitled to First Amendment protection. Petitioner's act against the complainant plainly involved "plac[ing] . . . on private property . . . a burning cross" which Petitioner knew or had reason to know would arouse "anger, alarm, or resentment in others on the basis of race." *Id.* at 508. His conduct therefore falls within the express language of the ordinance, as narrowed by Minnesota's highest court.

For this reason, Petitioner's assertion that Section 292.02 has no core of constitutionally proscribable conduct is incorrect. The analytical error which leads Petitioner to such a conclusion can be found in his rationale as to why the core conduct is not regulable. This is so, Petitioner argues, "since it is not possible to define a precise category" of protected expression which falls "outside the reach of this narrowly construed ordinance." Petitioner's Brief at 6. But that is a *non sequitur*. Whether Section 292.02 can be narrowly construed to constitutionally proscribe the conduct at issue is not logically related to the varieties of non-regulable conduct which

fall outside the ordinance's scope. For the very purpose of a narrowing construction is to save the ordinance from its overbroad sweep. Petitioner is arguing, in effect, for an expanded overbreadth rule which no longer countenances a state court's authority to impose a limiting construction.[3]

CONCLUSION

Petitioner's literary allusion to the oft-quoted exchange between Sir Thomas More and young Roper is an inspiring reference, but it seriously mistakes the nature of Petitioner's argument. To be sure, the civil liberties guaranteed by the Constitution must never be compromised simply to "catch the Devil"—to curb behavior which the majority finds offensive. This case, however, is not about Petitioner's lawful exercise of a civil liberty, but about his abuse of that liberty and the horrible impact of his conduct upon the civil liberties of innocent victims. A more apt reference for the logic advocated by Petitioner can be found in Socrates' conversations with the Sophists, whose reasoning the sage exposed as clever but fundamentally specious, and an impediment to justice. Plato, "The Sophist," in PLATO: THE COLLECTED DIALOGUES 957-1017 (E. Hamilton, H. Cairns eds. 1961). Too much is at stake in this proceeding to subject the civil liberties of real victims to the consequences of theory gone awry.

---

[3] In this connection, a key focus of Petitioner's overbreadth argument is that the language of the ordinance requires actual or imputed knowledge that the act in question "arouses anger, alarm, or resentment in others." The knowledge requirement is an element of the crime. Knowledge of the harm being inflicted demonstrates a criminal intent to attack and injure another human being.

Accordingly, the decision of the Minnesota supreme court should be affirmed.

Respectfully submitted,

Of Counsel:
DENNIS C. HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 486-9191

KEMP R. HARSHMAN
THE CLARENDON FOUNDATION
Suite 826
4201 S. 31st Street
Arlington, Virginia 22206
(202) 653-7451

RONALD D. MAINES *
JONES, WALDO, HOLBROOK & MCDONOUGH, P.C.
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037
(202) 296-5950
Attorney for Amici Curiae National Association for the Advancement of Colored People and The Clarendon Foundation

* Counsel of Record

August 23, 1991

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R.A.V.,
Petitioner,

v.

ST. PAUL, MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF FOR PEOPLE FOR THE AMERICAN WAY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

RICHARD S. HOFFMAN
(Counsel of Record)
KEVIN J. HASSON
JON A. BRILLIANT
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

ELLIOT M. MINCBERG
DEANNA R. DUBY
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for Amicus Curiae People for the American Way

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE MINNESOTA SUPREME COURT'S CONSTRUCTION OF THE ST. PAUL ORDINANCE IS BINDING ON THIS COURT 5

II. AS CONSTRUED, THE ST. PAUL ORDINANCE IS CONSTITUTIONAL 9

A. The Ordinance, As Construed, Is Not Overbroad 10

1. *Fighting Words* 13

2. *Incitement to Imminent Lawlessness* . 15

B. The Ordinance, As Construed, Is Not Unconstitutionally Vague 17

C. The Ordinance Is Not A Prohibited Content-Based Regulation 20

CONCLUSION 28

TABLE OF AUTHORITIES

CASES **PAGE**

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 20
Blount v. *Rizzi*, 400 U.S. 410 (1971) 20
Board of Airport Commissioner v. *Jews for Jesus,Inc.*, 482 U.S. 569 (1987) 12
Brandenberg v. *Ohio*, 395 U.S. 444 (1969) . . . . . *passim*
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) . . . . . *passim*
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 16
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 4, 10, 13
Cohen v. *California*, 403 U.S. 15 (1971) . 9, 14
Colten v. *Kentucky*, 407 U.S. 104 (1972) . . . 17
Cox v. *Louisiana*, 379 U.S. 536 (1965) 27
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961) 6
Erznoznik v. *Jacksonville*, 422 U.S. 205 (1975) 27
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 25
Gooding v. *Wilson*, 405 U.S. 518 (1972) . . . . . *passim*
Hamling v. *United States*, 418 U.S. 87 (1974) 18
Herbert v. *Louisiana*, 272 U.S. 312 (1926) 6

Hess v. *Indiana*, 414 U.S. 105 (1973) 15, 16
Hicks v. *Feiock*, 485 U.S. 624 (1988) 7
Houston v. *Hill*, 482 U.S. 451 (1987) 11
In re R.A.V., 464 N.W.2d 507 (Minn. 1991) . . . . . *passim*
In re S.L.J., 263 N.W.2d 412 (Minn. 1978) . . . . . *passim*
Kolender v. *Lawson*, 461 U.S. 352 (1983) 17
Kucharek v. *Hanaway*, 902 F.2d 513 (7th Cir. 1990) 26
Lewis v. *New Orleans*, 408 U.S. 913 (1972) 14
Lewis v. *New Orleans*, 415 U.S. 130 (1974) 12, 14
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) 6
Members of City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) . . . 10, 20, 22
Michigan v. *Long*, 463 U.S. 1032 (1983) 5
Miller v. *California*, 413 U.S. 15 (1973) 19
Murdock v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) 5
New York v. *Ferber*, 458 U.S. 747 (1982) 10, 25
Norwell v. *City of Cincinnati*, 414 U.S. 14 (1973) 13
Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 17
Papish v. *Board of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973) 27

Police Department v. *Mosley*, 408 U.S. 92 (1972) 27
Smith v. *Goguen*, 415 U.S. 566 (1974) 17
Spence v. *Washington*, 418 U.S. 405 (1974) 9
Street v. *New York*, 394 U.S. 576 (1969) . . . 12
Terminiello v. *City of Chicago*, 337 U.S. 1 (1949) 2, 6
Texas v. *Johnson*, 491 U.S. 397 (1989) 10, 20, 21
United States Civil Serv. Comm'r v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548 (173) 18
United States v. *Eichman*, 110 S. Ct. 2404 (1990) 21
United States v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) 5
United States v. *O'Brien*, 391 U.S. 367 (1968) 26
Virginia v. *American Booksellers Association*, 484 U.S. 383 (1988) 11
Weightman v. *Clark*, 103 U.S. 256 (1880) . 6, 8
West v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940) 7
Winters v. *New York*, 333 U.S. 507 (1948) 6, 18
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 23

CONSTITUTIONAL PROVISIONS:

Amendment I . . . . . *passim*
Amendment XIV 9, 10, 29

STATUTES AND ORDINANCES:

Minn. St. §609.72 (1990) 9, 14
St. Paul, Minn., Ordinance §292.02 (1990) 8, 28

INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of People for the American Way ("People For"), a non-partisan, education-oriented citizens' organization established to promote and protect civil liberties and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 300,000 members nationally. People For's own education and advocacy activities depend fundamentally on First Amendment rights, and it has a broad concern for protecting such freedoms in our country. People For has submitted *amicus* briefs to this Court in support of free expression in a number of its recent cases, including *Texas* v. *Johnson* and *United States* v. *Eichman*.

At the same time, the organization is devoted to promoting religious and racial tolerance and pluralism. People For believes that this case presents the opportunity to draw an appropriate line between a state's right to regulate a narrowly defined category of hate-crime related to unprotected conduct, while at the same time preserving the important First Amendment safeguards for expressive conduct recognized by this Court in *Johnson* and *Eichman*. People For believes that the decision of the Minnesota Supreme Court, narrowly construing the ordinance enacted by the City of St. Paul, is a rational and constitutional response to this difficult problem.

This brief is filed pursuant to Rule 37.3 of the Rules of this Court. The parties have consented to its submission with letters on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Despite petitioner's attempt to make it so, this case is not about the ability to legislate politically correct speech. Rather, the question presented is whether a state law, as construed by the state's highest court, may constitutionally punish hate-crime related expressive conduct that (1) is "directed to inciting or producing imminent lawless action and is likely to produce" that result, or that (2) constitutes "fighting words." *In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991). We believe that it may without running afoul of the First Amendment.

People For agrees with petitioner that, if considered without limitation, the prohibition in the City of St. Paul ordinance of conduct that "arouses anger, alarm or resentment in others" cannot withstand constitutional scrutiny. But that is not the question presented here. Under well settled precedent, the beginning of this Court's analysis is the construction of the St. Paul ordinance by Minnesota's highest court. That limiting construction is an application "of state law that is as binding on [this Court] as though the precise words had been written into the ordinance." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949).

As so construed, the ordinance is neither unconstitutionally vague nor overbroad. Contrary to petitioner's suggestion, the construction by the Supreme Court of Minnesota does not merely permit that conduct which is constitutionally protected and prohibit that which is not. Rather, the lower court's decision gives meaning and content to the prohibition on conduct designed to

"arouse anger, alarm or resentment in others" by reason of race, color, creed, religion, or gender, by limiting that prohibition to narrowly proscribed situations where the speaker's words either incite listeners to imminent lawless conduct or are such a personal attack on the listener that they are likely to provoke the listener to a physical response. The meaning of these terms, as petitioner recognizes, are well established in the case law and petitioner's right to free expression can be fully protected by appropriate jury instructions applying the law, as construed.

Nor is the ordinance, as construed, overbroad. It now permits prosecution only in two narrowly limited circumstances and for conduct long held to be unprotected by the First Amendment. First, the ordinance forbids use of a symbol, object, appellation, characterization or graffiti where it is designed and is likely to incite imminent lawless action. At least since *Brandenberg v. Ohio*, 395 U.S. 444 (1969), this Court has held that even pure speech, let alone expressive conduct such as burning an object on the private property of another, that is designed and is likely to incite a riot, is subject to prohibition. There can be little doubt that if R.A.V. donned a hood and burned a cross near the front door of the home of an Afro-American family while yelling "burn the niggers out" to a group of like-minded, hooded men, he could be prosecuted under *Brandenberg*. Indeed, the petitioner concedes as much by recognizing that, under proper facts, a cross-burner could be prosecuted under a Minnesota statute prohibiting "terroristic threats." Petitioner's Brief at 13 & n.7. Similarly, there is little doubt that R.A.V. could constitutionally be prosecuted under

Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942), if he walked up to the owner of the home and insulted him with racial (or other) personal invectives that challenged him to a physical confrontation.

Given the Minnesota Supreme Court's interpretation of the ordinance, the ultimate question in this case will be whether the circumstances of R.A.V.'s burning of a cross on the lawn of this family amounted to such a personal attack or threatened to incite "an immediate breach of the peace." These are questions that cannot and should not be answered by this Court on this record, which concerns only a facial challenge to the St. Paul ordinance.

Finally, the contention that the ordinance and the Minnesota Supreme Court's construction of it are constitutionally flawed because they amount to a "content based" regulation on expressive conduct ignores the impact of this definitive limiting construction. *All* analyses of whether particular words or actions constitute an incitement to riot or are likely to incite an immediate breach of the peace must of necessity focus on what is said or done by the speaker. Words and actions do not have meaning in a vacuum. They must be analyzed in light of history and human experience. The Minnesota Supreme Court's recognition that cross-burning is a known symbol of racial and religious violence and hatred is not a statement that *all* such actions may be constitutionally prohibited -- they may not -- but merely a recognition that what we know from our history need not be ignored when determining whether a particular act falls into that narrow category of expressive conduct that,

in a particular case, may be prohibited under the settled principles of this Court. Nor does the law's focus on incitement to immediate racial or religious violence, as opposed to all incitement, create a prohibited content-based regulation. Within the ambit of *unprotected* expression constituting incitement or fighting words -- expression that is outside the broad reach of the First Amendment -- state legislatures are free to single out particular evils subject to special sanctions.

The decision in this case should be affirmed and remanded to the trial court for a development of the factual record and a determination whether R.A.V.'s conduct violates the ordinance, as construed.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S CONSTRUCTION OF THE ST. PAUL ORDINANCE IS BINDING ON THIS COURT

This Court lacks jurisdiction to decide questions of state law. *See, e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874). The Court also "lack[s] jurisdiction authoritatively to construe state legislation," *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972) (*quoting United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971)), and is bound by the construction given a state statute by the highest court of that state. A state court's "construction of [an] ordinance is a ruling on a question of state law that is as binding on [this Court] as though the

precise words had been written into the ordinance." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

This is true even when the state court's "construction" is more in the nature of an amendment. As this Court has often stressed, the state court's "authoritative interpretation . . . 'puts these words in the statute as definitively as if it had been so amended by the legislature.'" *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278, 285 (1961) (*quoting Winters* v. *New York*, 333 U.S. 507, 514 (1948)). *See also Herbert* v. *Louisiana*, 272 U.S. 312, 317 (1926); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 73 (1911); *Weightman* v. *Clark*, 103 U.S. 256, 260 (1880).

It is true, moreover, even where the state court's construction itself creates constitutional difficulty -- or actually serves to invalidate an otherwise *constitutional* enactment. Thus, in *Terminiello* the Court reversed a conviction for disorderly conduct because the state trial court had instructed the jury that the statutory phrase "breach of the peace" included even "misbehavior [that] stirs the public to anger [or] invites dispute . . . ." *Terminiello*, 337 U.S. at 3. Although there was a substantial question whether Terminiello's speech constituted fighting words that made his conviction entirely proper, the Court did not reach that question but instead reversed the conviction because the ordinance under

which he was convicted was, as construed, unconstitutional. *Id.* at 3-4.[4/]

Finally, this Court is bound even when it could be argued that the state court's construction appears manifestly wrong. *See, e.g.*, *Hicks* v. *Feiock*, 485 U.S. 624, 629 (1988) ("We are not at liberty to depart from the state appellate court's resolution of these issues of state law . . . [even though] petitioner marshals a number of sources in support of the contention that the state appellate court misapplied [that] law . . . .") (footnote omitted); *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223,

---

[4/] The Court has likewise properly declined to supply a saving construction for a state statute in danger of invalidation. Thus, in *Gooding* the Court struck down a Georgia statute that prohibited the "use to or of another, and in his presence . . . [of] opprobrious words or abusive language tending to cause a breach of the peace . . . ." *Gooding*, 405 U.S. at 519. The Court found that the statute could only withstand "attack upon its facial constitutionality if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech . . . protected by the First and Fourteenth Amendments . . . . Only the Georgia courts can supply the requisite construction, since of course we lack jurisdiction authoritatively to construe state legislation." *Id.* at 520 (citations and quotation omitted).

237-38 (1940).[2] The starting point of this Court's analysis of St. Paul, Minn. Ordinance §292.02 (1990), is thus the construction placed on that ordinance by the Minnesota Supreme Court, namely that the ordinance's prohibition of expression that "arouses anger, alarm or resentment in others . . . ." reaches only such conduct that also amounts to fighting words or incitement to imminent lawless action. *In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).[3]

---

[2] The only exception to the requirement of absolute deference to state-court construction of state law is when some aspect of the state court's interpretation itself violates federal law. *See Weightman v. Clark*, 103 U.S. at 260 ("As a rule, we treat the construction which the highest court of a state has given a statute of the State as part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which in our opinion were lawfully made, that we disregard them."). No such circumstance exists here.

[3] Although, as noted, this construction is binding on this Court regardless of its apparent correctness, it nonetheless bears emphasis that the construction is consistent with prior Minnesota precedent. The Minnesota Supreme Court construed the ordinance in light of *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978), where the Minnesota Supreme Court upheld a disorderly conduct statute that employed language (continued...)

II. AS CONSTRUED, THE ST. PAUL ORDINANCE IS CONSTITUTIONAL

There is little question that the conduct which the St. Paul disorderly conduct ordinance is intended to regulate is a form of expression implicating the First and Fourteenth Amendments. *Spence* v. *Washington*, 418 U.S. 405, 410 (1974). Burning a cross or painting a swastika is certainly an activity which is perpetrated with an "intent to convey a particularized message" and with a substantial "likelihood . . . that the message [will] be understood by those who view it." *Id.* at 410-11. And this Court has often held that the government cannot ban the expression of an idea, through conduct or speech, merely because society finds that idea offensive or

---

[3](...continued)
strikingly similar to the St. Paul ordinance. The statute upheld in *In re S.L.J.* prohibited "offensive" language "tending reasonably to arouse alarm, anger or resentment in others." *Id.* at 415 (citing Minn. Stat. §609.72 (1990)). It was constitutional, the court held, because it would be construed to be limited to "fighting words" -- words that constitute "such personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id.*, *quoting Cohen* v. *California*, 403 U.S. 15, 20 (1971). The St. Paul City Council should, of course, be presumed to have known of the state Supreme Court's construction of that statute when it later chose essentially identical language for its ordinance.

politically incorrect. *See,e.g., Texas* v. *Johnson,* 491 U.S. 397, 398 (1989); *Members of City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 804 (1984). As construed, however, the St. Paul ordinance avoids these infirmities. By limiting application of the St. Paul ordinance to "fighting words," *see Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), and to speech which incites or is very likely to incite an audience to "imminent lawless action," *see Brandenberg* v. *Ohio,* 395 U.S. 444 (1969), the Minnesota Supreme Court has construed the ordinance to cover only conduct that may be restricted without violating the First and Fourteenth Amendments.

A. The Ordinance, As Construed, Is Not Overbroad

Although the overbreadth doctrine provides an important safeguard for dealing with statutes invalid on their face, the doctrine also has important limitations. Finding a statute void for overbreadth is "strong medicine," which is used sparingly and only where there is no alternative solution. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973); *see also New York* v. *Ferber,* 458 U.S. 747 (1982); *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978).

As explained in *Broadrick:*

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting

> construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. . . . Facial overbreadth has not been invoked when a limiting construction *has been* or *could be* placed on the challenged statute.

413 U.S. at 613 (emphasis added). Thus, in *Broadrick,* the Court held that "the Oklahoma statute, [at issue there,] *when authoritative, administrative constructions are accepted,* is not invalid under such a rule." *Id.* at 616 n.14 (emphasis added). Here, as in *Broadrick*, the statute "has been" limited by the court with the final word on its meaning -- the Minnesota Supreme Court.[4/]

[4/] For this reason, petitioner's reliance on cases holding that "the statute must be 'readily susceptible' to the limitation; [the Court] will not rewrite a state law to conform it to constitutional requirements," *Virginia* v. *American Booksellers Ass'n.*, 484 U.S. 383, 397 (1988), is misplaced. In each of the cases relied on by petitioner, the Court first considered whether the state court had offered a limiting construction to a potentially overbroad statute. Only where none existed did the Court then apply its own judgment and determine whether such a limiting construction was available. *See, e.g., Houston* v. *Hill*, 482 U.S. 451, 466 (1987) (no limiting construction by state courts applying ordinance criminalizing any act to

(continued...)

Here, the question of whether a limiting construction is "available" is not open -- the construction has already been made. Thus, the question is whether the ordinance remains "overbroad" because it prohibits expression likely to incite imminent lawless actions or constituting "fighting words."

4/(...continued)

"oppose, molest, abuse or interrupt" a police officer in performance of his duty, and declining to abstain and certify question to Texas court); *Board of Airport Comm'r. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (recognizing that state court had not had opportunity to limit a regulation prohibiting all "First Amendment activity" in public airport); *Lewis v. New Orleans*, 415 U.S. 130, 135-36 (1974) (striking down city ordinance making it unlawful to direct any "obscene or opprobrious language" to a police officer); *Gooding*, 405 U.S. at 528 (recognizing court would be bound by limiting construction of an abusive language statute, but holding that no such construction had been made by prior state cases); *Street* v. *New York*, 394 U.S. 576 (1969) (striking down flag burning statute). Indeed, in *Lewis* the Court expressly recognized that the statute could have been saved by a construction limiting the ordinance to "fighting words," as defined in *Chaplinsky*, but that the state had expressly rejected such a construction. *Lewis*, 415 U.S. at 135-36.

1. *Fighting Words*

The "fighting words" doctrine was originally set forth in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). The facts in this case are remarkably similar to those in *Chaplinsky*. There, the New Hampshire Supreme Court upheld, against an overbreadth challenge, the constitutionality of a statute which stated: "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." On its face, that statute, like the St. Paul ordinance, clearly prohibited constitutionally protected speech, but the Supreme Court of New Hampshire narrowed the statute's application by holding that it applied only to fighting words -- words that, when addressed to an individual, would tend to provoke an average person to breach the peace. This Court affirmed, holding that conduct that tends to incite immediate violence is outside constitutional protection. *Id.* at 572. Put simply, *Chaplinsky* permits a state to punish for "words likely to cause an average addressee to fight." *Id.*

Petitioner correctly points out that the "fighting words" exception has been consistently restricted by the Court to extremely personally offensive insults,5/

5/ *Norwell* v. *City of Cincinnati*, 414 U.S. 14, 16 (1973).

directed to an individual, not a group,[6] present at the time of the verbal attack.[7] Indeed, these same limitations are also well-established in Minnesota law. In *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978), the Minnesota Supreme Court confronted a statute prohibiting, among other things, "offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse *alarm, anger, or resentment* in others." *Id.* at 415 (emphasis added) (citing Minn. Stat. §609.72 (1990)). Just as in *In re R.A.V.*, the Minnesota Supreme Court found the statute to be unconstitutionally overbroad on its face, but upheld the statute by narrowly construing it to apply only to "fighting words." The court in *S.L.J.* made clear what it meant by "fighting words": those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," 263 N.W.2d at 418 (*citing Cohen* v. *California*, 403 U.S. 15 (1971)). Presaging its holding in this case, the Minnesota court went on to make clear that:

> Words which do not fit this definition, no matter how offensive they may be, are not subject to criminal sanctions; and, if the statute being scrutinized punished more than "fighting words," it must either be struck down as facially overbroad or, if possible, construed narrowly to make it constitutional. *Id.*

---

[6] *Gooding*, 405 U.S. at 523.

[7] *Lewis* v. *New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring).

Given this clear understanding of the limitation now present in the St. Paul ordinance, petitioner can do little more than argue that *Chaplinsky* itself should be overruled. But that is an argument petitioner refuses to make and a question he did not present to this Court for review. The remaining question here is therefore factual -- whether the circumstances of R.A.V.'s cross-burning on the lawn of a private home in the presence of its owner, meet the narrow category of conduct covered by *Chaplinsky* and its progeny. That is a question to be answered on remand.

2. *Incitement to Imminent Lawlessness.*

States may proscribe action that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See Brandenberg* v. *Ohio*, 395 U.S. 444 (1969). Although not permitting use of the charge of "imminent lawless action" as a pretext to forbid the advocacy of ideas which the state does not approve of, *see Hess* v. *Indiana*, 414 U.S. 105 (1973), the First Amendment does not protect advocacy that is essentially directed toward encouraging an immediate lawless act. *Brandenberg*, 395 U.S. at 447. The *Brandenberg* doctrine requires both incitement *and* a present or imminent danger.

Where *Chaplinsky* focuses on the impact on the target of the speech or conduct, *Brandenberg* requires that a court look to the effect on the sympathetic audience. The feared lawless action by listeners must be truly imminent, not a vague potential that might occur at some distant date in the future. *See, e.g., Hess* (Court held that the words "We'll take the fucking street later," and "We'll take the fucking street again" failed to meet the imminence requirement of *Brandenberg*). Nevertheless, a person can be convicted for breaching the peace if that person "commit[s] acts or make[s] statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940).

Petitioner spends little time challenging the state's incorporation of the *Brandenberg* doctrine into the ordinance because there can be no doubt that inciting a riot, lynching, burning of a house or other violent acts are not constitutionally protected. From the record in this case, all the Court knows is that between 1:00 and 3:00 a.m. a group of young white males burned crosses in front of the home of the only black family on the block where the incident occurred. If the facts of this case, when tried, demonstrate that the defendant by his actions and any accompanying words was encouraging his companions to break the criminal law and commit further violence, and that the threat of such violence was real and immediate, then the ordinance may be constitutionally applied to petitioner. If there is no suggestions that petitioner was creating a threat of "imminent lawless action," then the ordinance, as construed, does not apply to him. In either event, there is no basis for this Court

to strike down the statute on a facial challenge before those facts are developed.

B. The Ordinance, As Construed, Is Not Unconstitutionally Vague

The void-for-vagueness doctrine requires that the language of a statute be sufficiently precise that people of ordinary intelligence need not guess at its meaning. Moreover, the statute must also be narrowly defined or authoritatively construed so that it does not encourage arbitrary and discriminatory enforcement. *See Kolender* v. *Lawson,* 461 U.S. 352 (1983); *Smith* v. *Goguen*, 415 U.S. 566, 572 (1974); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 168 (1972).

Nevertheless, like the overbreadth doctrine, the vagueness doctrine does not require perfection in statutory drafting. It is not designed to enable the courts to eliminate laws that are not perfectly drawn. *See Colten* v. *Kentucky*, 407 U.S. 104, 110-11 (1972) (upholding constitutionality of Kentucky disorderly conduct statute after the Kentucky Court of Appeals narrowed its breadth). It is intended to eliminate only those laws which cannot be, or have not been, properly reformed. Were it otherwise, no law would be safe. As this Court noted in *Broadrick*:

> Words inevitably contain germs of uncertainty. . . [ ] there are limitations in the English language with respect to being both specific and manageably brief, and it seems to

> us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Broadrick v. Oklahoma, 413 U.S. at 608 (*citing United States Civil Serv. Comm'r* v. *National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973)).

It is not enough, then, to find words that, without context, are ambiguous. If the words of a statute have a precise meaning either in the context of the statute, *Winters* v. *New York*, 333 U.S. 507, 518 (1948), or as construed by previous case law, *Hamling* v. *United States*, 418 U.S. 87, 114-16 (1974), it generally should not be held void for vagueness. Thus, in *Hamling* a statute that merely used the word "obscene," without defining that term, was not unconstitutionally vague because the word "obscene" had authoritatively been construed by prior cases. *Id.* at 118-19.

By this test, the St. Paul ordinance, as construed by the Minnesota Supreme Court, is constitutionally sound. It proscribes only "fighting words" and speech that incites a crowd to "imminent lawless action." As discussed above, the phrases "fighting words" and "incitement to imminent lawless action," have distinct meanings developed by case law beginning with *Chaplinsky*, fifty years ago. Each of these phrases has

come to define a very specific type of conduct or speech that states are permitted to proscribe. The meanings given by case law to "fighting words" and "incitement to imminent lawless action" are sufficiently established that the average citizen has fair notice of what conduct is restricted by a law banning those categories of speech. Likewise, because the meaning of "fighting words" and incitement to "imminent lawless action" are so well ensconced in law, a statute or authoritative construction using those phrases invokes very specific guidelines, which prevent law enforcement officers from applying the statute capriciously.

It is clear that the Minnesota Supreme Court intended that the St. Paul ordinance be construed to ban only speech which creates "anger, alarm, or resentment" by reason of race, color, creed, religion or gender to the degree that it constitutes "fighting words" or "imminent incitement to lawless action," as those phrases have been authoritatively interpreted by this and other courts.

The fact that it may not always be easy for a police officer to determine exactly what constitutes "fighting words" or what constitutes "incitement to imminent lawless action," is not a constitutional impediment. Indeed, this Court in the obscenity area has permitted a variety of statutes purporting to limit lewd or pornographic speech under the standards expressly requiring a case-by-case analysis of the content of the speech. *See, e.g., Miller* v. *California*, 413 U.S. 15 (1973). The fact that it may be difficult to draw the line between what is obscene (unprotected speech) and what is not, does not mean obscenity cannot be regulated. *See, e.g., Miller*,

413 U.S. at 15; *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). So, too, the fact that display of objects, including a burning cross or Nazi swastika, may be protected in certain situations, does not make it "vague" to ban their use when such use is intended to incite others to imminent lawless action or when such use is directed to a particular individual in a circumstance constituting fighting words.

C. The Ordinance Is Not A Prohibited Content-Based Regulation

Petitioner complains that the St. Paul ordinance lists, by way of example, certain objects, and restricts its application to conduct having an impact on others by reason of "race, color, creed, religion or gender." Petitioner contends that the ordinance therefore "censor[s] expression associated with unpopular minorities." Petitioner's Brief at 10.

Petitioner is mistaken.[8/] Cross-burning and

[8/] We agree, of course, that if the St. Paul ordinance did censor minority views, it would clearly be unconstitutional. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). This Court made clear in *Texas* v. *Johnson*, 491 U.S. 397 (1989), that states may not regulate expressive conduct where that regulation is for the purpose of suppressing even the most repugnant ideas. But that (continued...)

the display of swastikas are listed in the ordinance merely as examples of potentially prohibited conduct. The text prohibits display of *any* symbol or object under circumstances likely to incite imminent violence, or constituting fighting words, on the basis of race, creed, religion or gender. It applies regardless of the actor's particular viewpoint. It applies as much to a Jew brandishing the Star of David and inciting an attack on a family of German descent as a Nazi provoking others to attack a Jew. Unlike, for example, the statutes struck down in *Texas* v. *Johnson*, 491 U.S. 397 (1989), and *United States* v. *Eichman*, 110 S. Ct. 2404 (1990), which were restricted to desecration of a *particular* symbol -- the American Flag -- and thereby punished those critical of that symbol, the instant ordinance displays no bias based on point of view.[9/] The ordinance does not "favor

---

[8/](...continued)
is not what this ordinance does. Petitioner's argument on this point thus not only ignores the state court's limiting construction, it ignores the ordinance itself.

[9/] This case is fundamentally different than *Johnson* and *Eichman* in several ways. First, as noted above, *Johnson* and *Eichman* involved statutes restricted to a particular symbol and therefore related only to those critical of the idea embodied by that symbol. Second, as applied to the defendants in those cases, the statutes were clearly being used to attack the idea being expressed without reference to any (continued...)

some viewpoints or ideas at the expense of others." *Vincent*, 466 U.S. at 804. Thus, the ordinance cannot fairly be characterized as a "censorial statute directed at particular groups and viewpoints." *Broadrick*, 413 U.S. at 616.

Petitioner nevertheless claims the ordinance is content-based because it focuses on race, color, creed or gender, and that such focus defeats the ability to narrow the statute to fighting words or incitement. Petitioner's argument puts the cart before the horse. As the ordinance has been authoritatively construed, its focus on the nature of the symbol and the particular categories listed is permissible for two reasons.) First, examining the "content" of the speech is necessary to determine whether the speech crosses the line between protected expression and impermissible incitement or fighting words. Second, because the ordinance is limited to breaches of the peace, it does not regulate protected speech at all. The legislature is surely free to decide that a particular category of certain *unprotected* conduct is worthy of special sanction.

[2/](...continued)
secondary effect -- the threat of violence by the sympathetic listener or the recipient of an insult. Thus, the state statute in *Johnson* and the federal statute in *Eichman* were not limited to regulating conduct outside the protection of the First Amendment.

As explained in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976):

> The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment."

In the area of obscenity, "any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area." *Id.* at 70. So, too, here, no statute could realistically prohibit activity likely to cause a breach of the peace without focusing on the communicative message being conveyed by the speech or expression. The Minnesota Supreme Court's recognition that cross-burning "is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy," *In re R.A.V.*, 464 N.W.2d 507, 508 (Minn. 1991), is *not* a statement that all cross-burning can be outlawed. Rather it is a recognition that this particular symbol conveys a message and has a meaning relevant to determining whether, in the circumstances, petitioners' actions crossed

the line between the protected expression of an obnoxious opinion and an imminent threat to breach the peace. Indeed, the Minnesota court was explicit that a ban on cross-burning or the display of any symbol, if it did not consider the context in which the conduct occurred, would be unconstitutional. *Id.* at 510. It is only when the prohibition is tied to the legitimate goal of protecting the public order from imminent breaches of the peace that the display of any expressive symbol may be prohibited. *Id.* Indeed, in this area -- as in obscenity, libel and other "expressive" conduct or speech falling outside the realm of First Amendment protection -- it is the content of the act or speech that makes it subject to punishment.

A state is free to single out particular types of fighting words or particular categories of incitement for special sanction. The role of the courts is to ensure that the legislature does not inhibit protected expression; how states choose to deal with conduct *not* protected by the First Amendment is a matter of legislative choice. Thus, while all obscenity is outside the protection of the First Amendment, individual states may choose to focus on particular types of obscenity, such as displays of child pornography, bestiality or the like and permit displays that might otherwise be deemed obscene. As stated in

New York v. *Ferber*, 458 U.S. 747, 760-61 (1982):

> Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.

So, too, states may set their own standards for libel and slander, so long as they meet the minimum requirement of fault established in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Legislatures frequently design laws to attack specific aspects of social problems. As long as the legislature acts constitutionally, the courts must defer to the choices of democratically elected representatives.[10/]

[10/] The argument that Minnesota has other statutes that (continued...)

Although petitioner's brief does not address the issue of whether a state may engage in differential regulation of unprotected conduct, the issue is addressed in the *amicus* brief of Center for Individual Rights ("Center"). Center contends that although a state may prohibit all "fighting words" it may not select particular fighting words for special sanction. Center's Brief at 10. The cases it cites from this Court do not support that proposition.[11/]

[10/](...continued)

proscribe the conduct engaged in by R.A.V., Petitioner's Brief at 13-14, is irrelevant to determining the constitutionality of the ordinance before this Court. The States are not restricted from adopting laws that prohibit cross burning and other acts in a context where they threaten a breach of the peace. This Court has stated that "it has never been suggested that there is anything improper in [a legislature] providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest." *United States* v. *O'Brien*, 391 U.S. 367, 380 (1968).

[11/] Center relies on dicta in one lower court case, *Kucharek* v. *Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), suggesting that a state may not select certain types of obscenity to regulate while permitting other obscene speech. That statement is simply wrong. The suggestion that a state may not "disfavor" a particular obscene message for, by example, applying (continued...)

In each of those cases the Court confronted "time, place and manner" restrictions that impermissibly differentiated between types of protected First Amendment activity. Because time, place and manner regulations permit restrictions on where, when and how *protected* activity or speech may take place for reasons *independent* of the content of the speech, they must be content neutral. *Police Dep't* v. *Mosley*, 408 U.S. 92, 99 (1972). Thus, in *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 208 (1975), the Court began its discussion of a regulation requiring screening from public view only movies showing nudity in drive-in theatres with the statement that "[a]ppellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity and thus applies to films that are *protected by the First Amendment*." (Citations omitted) (emphasis added). Similarly in *Mosley* and *Cox* v. *Louisiana*, 379 U.S. 536 (1965), purported time, place and manner restrictions on picketing which differentiated among picketers on the basis of content were impermissible because the picketing at issue "plainly involves expressive conduct within the protection of the First Amendment." *Mosley*, 408 U.S. at 99. And in *Papish* v. *Board of Curators of the Univ. of Missouri*, 410 U.S. 667, 670 (1973), the Court made clear "neither

---

[11/](...continued)

a stricter or additional penalty, is directly contrary to *Ferber*. In support of that statement, Judge Posner cited the very cases relied on by Center, without recognizing that all of those cases involve regulations of *protected* speech or conduct.

the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected." This Court has never suggested that there are constitutional limits on a state's right to regulate conduct outside the scope of the First Amendment.

CONCLUSION

Petitioner and supporting *amici* incorrectly suggest that a state may not regulate hate-crime related expression in statutes specifically aimed at such expression, even where those statutes are narrowly tailored to address a legitimate state interest in punishing only expression *outside* the realm of First Amendment protection. Where, as here, a law is authoritatively construed to apply only in situations involving incitement to imminent lawless action or "fighting words," the right to free expression is fully protected and the law does not offend the Constitution. For the foregoing reasons, the decision of the Minnesota Supreme Court should be affirmed, and this Court should hold that St. Paul, Minnesota Ordinance §292.02, as construed, does not

violate the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

Richard S. Hoffman
(Counsel of Record)
Kevin J. Hasson
Jon A. Brilliant
Williams & Connolly
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Elliot M. Mincberg
Deanna R. Duby
People for the
American Way
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for *Amicus Curiae*
People for the American Way

August 23, 1991

No. 90-7675

Supreme Court, U.S.
FILED
AUG 26 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R.A.V.,

Petitioner,

—against—

CITY OF ST. PAUL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENT SUBMITTED BY THE CENTER FOR DEMOCRATIC RENEWAL, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL COUNCIL OF LA RAZA, THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW, THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, THE NATIONAL LAWYERS GUILD, THE UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, THE NATIONAL INSTITUTE AGAINST PREJUDICE AND VIOLENCE, THE GREATER BOSTON CIVIL RIGHTS COALITION AND THE NATIONAL COALITION OF BLACK LESBIANS AND GAYS.

Suzanne Shende
Joan Gibbs
Frank E. Deale*

Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

Counsel for Amici Curiae

* Counsel of Record

212-614-6464

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
CONSENT OF THE PARTIES	1
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. ST. PAUL ORDINANCE 292.02, AS NARROWED BY THE MINNESOTA SUPREME COURT AND AS APPLIED, REACHES NO PROTECTED SPEECH AND IS THEREFORE CONSTITUTIONAL	5
II. IF § 292.02 REACHES SOME PROTECTED SPEECH, THE STATE HAS A COMPELLING STATE INTEREST IN PROHIBITING SUCH CONDUCT	9
A. The state has a compelling interest in reducing the severe harm done to individuals and groups by bias-related violence.	17

B. The Government has previously articulated its compelling state interest in combatting bias-related violent conduct 21

C. The ordinance, as judicially construed, is a narrowly tailored means to serve the state interest 30

III. § 292.02 SERVES A COMPELLING STATE INTEREST IN ADDRESSING SEXIST VIOLENCE 31

IV. THIS COURT SHOULD NOT FORECLOSE THE USE OF "HATE CRIME" LEGISLATION TO OPPOSE RISING HOMOPHOBIC VIOLENCE 34

CONCLUSION 39

INDEX TO APPENDIX A

TABLE OF AUTHORITIES

CASES

Abrahms v. U.S., 250 U.S. 616 (1919) 29

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 10

Boos v. Barny, 108 S.Ct. 1157 (1908) 10,21

Bowers v. Hardwick, 478 U.S. 186 (1986) 39

Brandenberg v. Ohio, 395 U.S. 444 (1969) passim

Broadrick v. Oklahoma, 412 U.S. 601 (1973) 7

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 6

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) passim

City of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1986) 10

Cohen v. California, 403 U.S. 15 (1971) 29

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 21

Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985) 10

Crumsey v. The Justice Knights of the Ku Klux Klan, No. CIV-1-80-287 (E.D. Tenn.

Mar. 1, 1982) 28

Daniels v. Essex Group, Inc., ___ F.2d ___ (7th Cir. July 24, 1991) (1991 U.S. App. Lexis 16158) 20

Dombrowsky v. Pfister, 380 U.S. 479 (1965) 8

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 10

Gooding v. Wilson, 405 U.S. 518 (1972) 6,9 31

Haig v. Agee, 453 U.S. 280 (1981) 10

Kolender v. Lawson, 416 U.S. 352 (1983) 6

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 10

Lewis v. New Orleans, 408 U.S. 518 (1972) 31

Miller v. California, 413 U.S. 15 (1973) 10

Monroe v. Pape, 365 U.S. 167 (1961) 14,23

New York Times v. Sullivan, 376 U.S. 254 (1964) 28

New York v. Ferber, 458 U.S. 747 (1982) 6,7 10

Norwell v. City of Cincinnati, 414 U.S. 14 (1973) 31

Posadas de Puerto Rico Associate v. Tourism Co., 478 U.S. 328 (1986) 5,10

In re R.A.V., 464 N.W.2d 507 (Minn. 1991) cert. granted sub nom., R.A.V. v. St. Paul, MN, 111 S. Ct. 2795 (1991) passim

Roth v. U.S., 354 U.S. 476 (1957) 30

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) 32

Street v. New York, 394 U.S. 576 (1969) 11

Terminiello v. Chicago, 337 U.S. 1 (1949) 11

U.S. v. Eichman, 496 U.S. ___, 110 S. Ct. 2404 (1990) 11

U.S. v. Guest, 383 U.S. 745 (1966) 23

U.S. v. Lee, 935 F.2d 952 (8th Cir. 1991) 12,15 30

U.S. v. Long, 935 F.2d 1207 (11th Cir. 1991) 13

U.S. v. Mitchell, 463 F.2d 187 (8th Cir. 1972), cert. denied, 410 U.S. 969 (1973) 12

U.S. v. Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1990) 12

U.S. v. Price, 383 U.S. 787 (1966) 22-23

U.S. v. Salyer, 893 F.2d 113 (6th Cir. 1989) 12,15

Vietnamese Fishermen's Ass'n v. The Knights of The Ku Klux Klan, No. H-81-895 (S.D. Tex. May, 14, 1981) 17-18

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 31,32

Watts v. United States, 394 U.S. 705 (1969) 10,12

Whitney v. California, 274 U.S. 357 (1927) 27,28

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 10

STATUTES AND CONSTITUTIONAL PROVISIONS

St. Paul City Charter, Legislative Code, ch 292, § 292.02 (1990) passim

18 U.S.C. 241 12,22

18 U.S.C. 242 22

18 U.S.C. 1091(a),(c) 22

28 U.S.C. § 534 15,23 36

42 U.S.C. 1981 22

42 U.S.C. 1982 22

42 U.S.C. 1983 22,23

U.S. Const. amend. I passim

U.S. Const. amend. XIII 22

U.S. Const. amend. XIV 22,23

U.S. Const. amend. XV 22

U.S. Const. amend. XIX 22

CONGRESSIONAL DOCUMENTS

135 Cong. Rec. H3179 (1989) (statement of Rep. Schumer) 23-24

135 Cong. Rec. H3180 (1989) (statement of Rep. James) 27

135 Cong. Rec. H3180 (1989) (statement of Rep. Gekas) 45

135 Cong. Rec. H3188 (1989) (statement of Rep. Brennan) 26

135 Cong. Rec. H3185 (1989) (statement of Rep. Cardin) 25

135 Cong. Rec. H3185 (1989) (statement of Rep. Studds) 20-21

136 Cong. Rec. S1072, S1074, S1079 (1990) (statement of Sen's. Simon, Hatch and Gorton) 15-16

136 Cong. Rec. S1073 (1990) (statement of Sen. Hatch) 19-20, 26

136 Cong. Rec. S1069 (1990) (Sen. briefing paper) 36-37

135 Cong. Rec. H3182 (1989) (statement of Rep. Green) 25-26

135 Cong. Rec. H3182 (1989) (statement of Rep. Kennelly) 26

Women, Violence and the Law: Hearing Before the House Select Committee on Children, Youth and Families, 100th Cong., 1st Sess. (1987) 33,34 35

Racially Motivated Violence: Hearings Before the Subcommittee of the House Committee on the Judiciary, (100th Cong., 2nd Sess. (1988) passim

Increasing Violence Against Minorities: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary 96th Cong., 2nd Sess. (1980) 16,27

Antigay Violence: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 99th Cong., 2nd Session (1986) 37,38 39

OTHER AUTHORITIES

Brief Amicus Curiae of the American Civil Liberties Union, R.A.V. v. St. Paul, MN, (1991) (No. 90-7675) 8

Brief for Petitioner, R.A.V. v. St. Paul, MN, (1991) (No. 90-7675) passim

Center for Democratic Renewal, Weekly Update (June 5, 1989, Sept. 11, 1989, Oct. 23, 1989) 32

Centre for Social Development and Human Affairs, United Nations, Violence Against Women in the Family (1989) 14

D. Chalmers, Hooded Americanism: The History of the Ku Klux Klan (1981) 14,42

T. Clark, The South Since Reconstruction, 1973 42,44

G. Comstock, Violence Against Lesbians and Gay Men (1991) passim

Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989) 20,43

National Institute Against Prejudice and Violence, Vol. 5, No. 1, Forum (1990) 19

Petition for Writ of Certioari, R.A.V. v. St. Paul, MN, (1991) (No. 90-7675) passim

Ransby, "Racism and Free Speech," The Agenda, (June 1989) (Ann Arbor, MI) 44

J. Ridgeway, Blood in the Face: The Ku Klux Klan, Aryan Nations, Nazi Skinheads, and the Rise of a New White Culture (1990) 14,27

J. & H. Schwendiger, Rape and Inequality (1983) 34

Scott-McLaughlin, Center for Constitutional Rights, Racially Motivated Violence (1984) 18,29 42

Seattle Times, July 31, 1991 at 1,8 43

Sims, The Klan (1978) 14

The Southern Poverty Law Center, 54 Klanwatch Intelligence Report 1 (Feb. 1991) 24

U.S. Commission on Civil Rights, Intimidation and Violence: Racial and Religious Bigotry in America (1983) 17

J. Weiss, H. Ehrlich, B. Larcom, "Ethnoviolence at Work," (presented to the American Sociological Association, Aug. 23, 1991) (available from the National Institute Against Prejudice and Violence) 19

Williams, The Obliging Shell, 87 Mich. L. Rev. 2128, 2142 (1989) 44

Williams, Violence Against Women, 12 The Black Scholar 18 (1981) 34

C. Wolf Harlow, U.S. Dept. of Justice, Female Victims of Violent Crime (Jan. 1991) 34

CONSENT OF THE PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the respondent. Letters of consent have been sent under separate cover to be filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The twelve organizations joining in the brief amici curiae (see Appendix) represent various segments of American society with diverse interests. They share a mutual concern about the severity and pervasiveness of bias-motivated violence, and urge the Court to affirm its and this nation's commitment to opposing this violence which reinforces historic inequality. Amici believe it is imperative that the Court enable states and cities to adopt legislation, within the parameters of the first amendment, to prohibit violence against people of color, women, and lesbians and gay men.

SUMMARY OF ARGUMENT

Cities and states across the country are facing a crisis of escalation of violence against people of color, women, lesbians and gay men, and Jewish people. Some local governments, recognizing the harm that is done to groups, individuals, and society at large by this bias-motivated violence, are attempting to deter and punish the atrocities with "hate crime" legislation, such as that of St. Paul Ordinance 292.02. The acts of violence, threats, and intimidation proscribed by these types of statutes are set against a backdrop of a historic reign of physical terror against the targeted groups. Current violence serves to reinforce and perpetuate long-established inequality, and the killings, beatings, arsons, and other injuries cause grave harm to individuals and groups alike.

The St. Paul Ordinance, narrowly construed by the Minnesota Supreme Court, proscribes only bias-motivated disorderly conduct that rises to the level of 1)

directed incitement of likely, imminent, lawlessness, Brandenberg, or 2) fighting words that are injurious or inciting immediate violence, Chaplinsky. The narrowing construction by the Minnesota Supreme Court thus confines the Ordinance to conduct that is explicitly outside of the protections of the first amendment. The Minnesota Court's interpretation of the Ordinance is authoritative, and it is that interpretation which must be reviewed by this Court. § 292.02, as judicially narrowed and as applied to the late-night cross burning on the lawn of a Black family's home, is constitutional.

Amici believe that the need to curb bias-related violence is so pressing and urgent that even if the Court were to find that some protected expression were implicated, the state has a compelling interest in restricting such terroristic conduct. The conduct prohibited by § 292.02, such as the cross burning allegedly committed by R.A.V, is not merely offensive and unpopular. Such conduct has been proven to be

the precursor, the trigger, the mobilizing event for violent rampage. The state has often stated its interest in eliminating racist and sexist violence, and the severe harms inflicted by such violence are well-documented. Given the context of multiple forms of violence inflicted against Blacks, Latinas and Latinos, Native American, Asian Americans, and women, the statute must be found to be a narrowly tailored means to serve a compelling state interest. In finding the Ordinance constitutional, this Court should support the efforts of localities to combat biased-threats and violence against people of color, women, lesbians, and gay men, within the parameters of the first amendment.

ARGUMENT

I. ST. PAUL ORDINANCE 292.02, AS NARROWED BY THE MINNESOTA SUPREME COURT AND AS APPLIED, REACHES NO PROTECTED SPEECH AND IS THEREFORE CONSTITUTIONAL

St. Paul Ordinance ch. 292, § 292.02 (1990)[1], as narrowly interpreted by the Minnesota Supreme Court, applies only to conduct falling outside the protections of the first amendment and is therefore constitutional. This Court has ruled that "in reviewing the constitutionality of the challenged [state] statute ..., we must abide by the narrowing constructions announced by the [state's highest court]... ." Posadas de Puerto Rico

---

[1]St. Paul City Charter, Legislative Code and Administrative Code, ch. 292, § 292.02 (1990) (hereinafter § 292.02), reads:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Ass'n. v. Tourism Co. 478 u.s. 328, 339 (1986). Minnesota Supreme Court's interpretation of § 292.02 is authoritative, and it is this interpretation which must be reviewed by the Court. Gooding v. Wilson, 405 U.S. 518 (1972), Kolender v. Lawson, 416 U.S. 352, 355 (1983). Thus, in determining whether § 292.02 is overbroad, this Court must abide by the Minnesota Court's narrowing construction, which confines the reach of the ordinance to activity not protected by the first amendment.

The Minnesota Supreme Court appropriately "construe[d] the statute to avoid constitutional problems." New York v. Ferber 102 S.Ct. 3348, 3361 (1982); Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985). It therefore explicitly limited St. Paul ordinance 292.02 to "expressive conduct that amounts to 'fighting words' -- conduct that itself inflicts injury or tends to incite immediate violence, see Chaplinsky v. New Hampshire, 315 U.S. at 572... [and] conduct that is 'directed to inciting or producing imminent lawless

action and is likely to produce or incite such action.' Brandenberg v. Ohio, 395 U.S. at 447." In re R.A.V., 464 N.W.2d 507, 510 (Minn. 1991) cert. granted sub nom. R.A.V. v. St. Paul, MN, 111 S.Ct. 2795 (1991) (No. 90-7675) (hereinafter R.A.V.). So interpreted, there is no "real" and "substantial" overbreadth of the ordinance: it prohibits only conduct that is unprotected by the first amendment under Chaplinsky v. New Hampshire, 314 U.S. 568 (1942), and Brandenberg v. Ohio, 395 U.S. 444 (1969). Broadrick v. Oklahoma 412 U.S. 601 (1973); Ferber at 3361.

Petitioner asserts that "[t]he ordinance prohibits the expression of ideas where there is no showing that any dangerous or unlawful activity will result," Brief for Petitioner at 21. The Minnesota court, however, specifically construed § 292.02 to be limited to such situations: where fighting words by definition invite violence or cause injury, Chaplinsky, and where expression is both intended and likely to produce

imminent lawless violence, Brandenberg.[2] While the overbreadth doctrine, and the ability to challenge an overbroad or vague statute, Dombrowsky v. Pfister, 380 US. 479 (1965) remain vitally important to first amendment freedoms, § 292.02 is characterized by neither of the invalidating flaws of vagueness or overbreadth. § 292.02 is a vehicle for combatting conduct, outside of the protection of the first amendment, aimed at particular groups traditionally targeted for the incitement of violence and injury. § 292.02 does not generally suppress public presentation or "mere abstract teachings," Brandenberg at 448, of white supremist or Nazi thought and literature. It does not forbid racist or sexist viewpoints which subjugate groups of people: it is specific and narrow in its reach.

Where an appellate court does not limit the

---

[2]In fact, the guidelines suggested by the ACLU are precisely met by the narrowing construction of the Minnesota court. Brief Amicus Curiae of the American Civil Liberties Union at 6, 19, R.A.V. (calling for threat directed at specific victim, intent to instill imminent reasonable fear of violence).

application of a statute to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed," as in Chaplinksy, the statute must be found to be overbroad. Gooding v. Wilson, 405 U.S. 518, 524 (1972). Such is not the case here: the Minnesota court explicitly construed the ordinance only to apply to that conduct prohibited by Brandenberg and Chaplinsky, and applied the statute appropriately to the facts in the case of R.A.V.

II. IF § 292.02 REACHES SOME PROTECTED SPEECH, THE STATE HAS A COMPELLING STATE INTEREST IN PROHIBITING SUCH CONDUCT

Because the statute as construed prohibits no activity protected by the first amendment, it need not be justified by a compelling state interest. However, even if the Court concludes that the statute reaches some protected speech, the statute should nonetheless

survive because it serves a compelling state interest and is narrowly drawn to serve that interest. Boos v. Barry, 108 S.Ct. 1157, 1164 (1988).[3] Petitioner repeatedly attempts to obscure the compelling state interest served by this ordinance by referring to the conduct that is prohibited as "unpopular," "insulting," "intolerant," "offensive," "disagreeable," "disturbing," "resented," and lacking "civility," Brief for Petitioner at 10, 14, 15, 16, 18, 21. Petitioner improperly analogizes this conduct to that which the Court has previously found protected by the first amendment: expression which is "provocative and challenging," has "unsettling effects," or "invites

---

[3]This Court has, on numerous other occasions, upheld statutes which restricted expression on the basis of their content or subject matter. See, e.g., Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Posadas; Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985); New York v. Ferber, 458 U.S. 747 (1982); Haig v. Agee, 453 U.S. 280 (1981); FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Miller v. California, 413 U.S. 15 (1973); Watts v. U.S., 394 U.S. 705 (1969).

dispute, induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Id. at 18, citing Terminiello v. Chicago, 337 U.S. 1, 3-4 (1949); U.S. v. Eichman, 496 U.S. ___, 110 S.Ct. 2404, 2406 (1990); Street v. New York, 394 U.S. 576, 591 (1969).

The conduct prohibited by St. Paul ordinance 292.02, as judicially interpreted and applied by the Minnesota Supreme Court, goes far beyond merely being offensive. Understood in context, cross burnings are more than "displays of intolerance" or "expressive conduct that the majority finds offensive or demeaning," despite Petitioner's characterization of them as such. Petition for Writ of Certiorari at 9, R.A.V. (hereinafter "Petition for Writ"). The acts prohibited by 292.02 amount to intimidation by threats of violence, and "[i]ntimidation by threats of physical violence is not

protected by the first amendment."[4] U.S. v. Lee, 935 F.2d 952, 956 (8th Cir. 1991) (holding that prohibition of conspiring to burn a cross to threaten or intimidate targeted individuals in the exercise of federally guaranteed right to rent and occupy a dwelling does not violate the first amendment). In upholding a conviction for a cross burning on the lawn of a Black family's home under 18 U.S.C. 241, the court of appeals for the 8th Circuit found that the nighttime cross burning on private property was

> ... . It was not mere advocacy, but an overt act of intimidation, which, because of its historical context, is often considered a precursor to or a promise of violence against Black people. ... To protect the inhabitants of this nation from such an attack on civil rights does not violate the first amendment.

See also U.S. v. Long, 935 F.2d 1207 (11th Cir. 1991) (when a cross was burnt on the lawn of a Black family in mostly white neighborhood, victim's race and specific circumstances can be considered to determine if victim was a "vulnerable victim" under sentence enhancement purposes).

Arguing that there is no compelling state interest and denying that any harm is done by intimidating conduct targeted against groups on the basis of race, color, creed, religion or gender, Petitioner further objects to judicial acknowledgement of the historical, contextual meaning of cross burning. "Without citing legal authority, the Minnesota Supreme Court stated that the burning of a cross is a symbol of violence and hatred based on 'virulent notions of racial supremacy .'" Petition for Writ at 5.

---

[4] See also Watts v. U.S., 394 U.S. 705, 707 (1969) (true threats are not constitutionally protected speech); U.S. v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) ("A 'true' threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence on his person, is unprotected by the first amendment"); U.S. v. Mitchell, 463 F.2d 187, 191 (8th Cir. 1972) (violent threats are devoid of constitutional protection), cert. denied, 410 U.S. 969 (1973);" U.S. v. Salyer, 893 F.2d 113 (6th Cir. 1989) (court affirmed conviction for cross burning under 18 U.S.C. 241 and enhancement of sentence because Black family was unusually vulnerable to the threat of cross burning).

There can be no question that the example of cross burning in the case at hand is the very embodiment of racial violence and hatred,[5] a fact reflected in legal authority. "[A] black American would be particularly susceptible to the threat of a cross burning because of the historical connotations of violence associated with the act. ... [T]he act has a special capacity to evoke terror among black Americans. ... There is a history of violence and intimidation which

---

[5] See Chalmers, Hooded Americanism: The History of the Ku Klux Klan, 15, 30, 41, 49, 63, 349-365, (1981) (school teachers tortured and murdered; Blacks whipped and burned with acid; public lynching; hideous torture; dynamiting of the mayor's home "under a blazing fiery torch" of a burning cross); Ridgeway, Blood in the Face: The Ku Klux Klan, Aryan Nations, Nazi Skinheads, and the Rise of a New White Culture, 24, 34, 68, 95 (1990); Sims, The Klan 46, 91, 104, 133, 144-5, 174-5, 193, 203, 253, 288, 298-9, 426-7 (1978) (bombings of homes, churches and school buses; arson of churches and houses; cross burnings; kidnapping and murder plots; shootings into crowds, cars and houses; floggings; stabbings; mutilations; hangings; castration; killings; the manufacture and buying of explosives and arms). See also Monroe v. Pape, 365 U.S. 167, 175-84 (1961) (testimony of members of the 42nd Congress as to how "a main scourge of the evil" of murders, whippings, lynchings, banishment, and arson left unpunished by the state was the Ku Klux Klan).

is directed against blacks and which is symbolized in a burning cross." U.S. v. Salyer, 893 F.2d 113, 116 (6th Cir 1989) (upholding sentencing enhancement for defendant who conspired to threaten and intimidate Black victims in the exercise of their civil rights by burning a cross at night in their yard in a predominantly white community). The Eighth Circuit Court of Appeals has quoted a victim of a cross burning on her own lawn who stated she "hope[d] they don't come up here and burn us up." U.S. v. Lee at 954. "[A] lot of the cross burnings in the South during the civil rights movement preceded hangings and that sort of thing. Of course, being a black, that is what it calls to mind." Id. at 956 n.5.

Congress repeatedly referred to cross burning as a precursor to or a promise of violence that government must counter when it passed the Hate Crime Statistics Act, 28 U.S.C. § 534 (hereinafter "Hate Crimes Statistics Act"). See 136 Cong. Rec. S1072, S1074, S1079 (1990)

(statement of Sen's. Simon, Hatch and Gorton). Given the history and context of racist violence, "obviously a black homeowner who finds a cross burning or simply planted on his lawn is experiencing an act of terror." Increasing Violence Against Minorities: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary 96th Cong., 2nd Sess. 83 (1980) (hereinafter "Increasing Violence Hearing") (statement of Irwin Suall, Anti-Defamation League of B'nai B'rith). As described in Congressional testimony, victims, and particularly Black families moving into previously all-white neighborhoods, "have crosses burned; they have their houses vandalized, burned to the ground. People who offer to sell or rent to minority families have their lives threatened." Racially Motivated Violence: Hearings Before the Subcommittee of the House Committee on the Judiciary (100th Cong., 2nd Sess. 18 (1988) (hereinafter "Racially Motivated Violence Hearings") (statement of Joan Weiss, Executive Director, National

Institute Against Prejudice and Violence). Organized violent white supremacists as well as unaffiliated perpetrators of racist violence "continue use of the burning of the cross ... as [an] instrument[] of intimidation." Id. at 14 (statement of Rev. C.T. Vivian, Chair of the Board, Center for Democratic Renewal). See also U.S. Commission on Civil Rights, Intimidation and Violence: Racial and Religious Bigotry in America, 10 (1983).

A. The state has a compelling interest in reducing the severe harm done to individuals and groups by bias-related violence.

There is overwhelming evidence of the likelihood of imminent violence, and of the injury inflicted by the conduct itself, as a result of actions such as those allegedly of R.A.V. Cross burnings in Kemah, Texas were followed by armed gunmen threatening the Vietnamese fishermen, and the burning of fishing boats owned by Vietnamese people in February 1981; in

February 1983 in North Carolina, crosses were burned and shots were fired into the homes of two interracial couples; and cross burnings in North Carolina's Iredell County have been accompanied by high-powered-rifle fire into homes. Vietnamese Fishermen's Ass'n v. The Knights of The Ku Klux Klan, No. H-81-895 (S.D. Tex. May, 14, 1981); Scott-McLaughlin, Center for Constitutional Rights, Racially Motivated Violence 4 (1984). Where the placement of a symbol that one knows will arouse anger and resentment on the basis of race, gender, creed, color, or religion rises to the levels delineated in Chaplinsky or Brandenberg, it is only an ahistorical and decontextualized view of reality that permits the assertion that there is no showing dangerous or unlawful action will result.

House burnings, lynchings, church bombings, and murderous shootings cause obvious harm no matter what the motivation. There is, however, ample evidence that violence motivated by prejudice has a

greater impact on its survivors than other forms of violent victimization. National Institute Against Prejudice and Violence, Vol. 5, No. 1, Forum 6 (1990). Victims of biased violence experience a much higher occurrence of serious behavioral and psychological symptoms stemming from the trauma. Id. See also J. Weiss, H. Ehrlich, B. Larcom, "Ethnoviolence at Work," (presented to the American Sociological Association, Aug. 23, 1991) (available from National Institute Against Prejudice and Violence). "The impact of ethnoviolence is traumatic and long-lasting. ... Their sense of personal violation is similar to that of the rape victim. ... They fear for their lives and those of their children. Some victims move away from communities, looking for a safe place." Racially Motivated Violence Hearings 24 (prepared statement of Joan Weiss). Cross burnings, the placing of Swastikas on synagogues, and other bias-related violence "create anxiety, unease, and concern about ... security. ... Emotional and psychological scars

can result from these crimes." 136 Cong. Rec. S1073 (1990) (statement of Sen. Hatch in support of "Hate Crimes Bill).

The devastating effects of bias-related harms have long been recognized by the judicial system. "It is well established that the victims of racial discrimination suffer physically and emotionally as a consequence of multiple incidents of harassment... ." Daniels v. Essex Group, Inc., ___ F.2d ___ No. 90-2663 (7th Cir. July 24, 1991) (1991 U.S. App LEXIS 16158 at 27-29) (affirming judgment for employee under Title VII who suffered ongoing racial harassment, including harassment by racist symbols).[6] Violence and threats motivated by violence are "particularly heinous" because the "effects

[6] The physiological and psychological symptoms of racial harassment include difficulty in breathing, rapid pulse rate, post-traumatic stress disorder, hypertension, alcoholism, and suicide, headaches, social withdrawal, chronic depression, anxiety neurosis, and displaced aggression. Daniels at LEXIS 29 n.3 (citing Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich.L.Rev. 2320 (1989).

are not felt solely by the individual against whom the crime is perpetrated. When a Jew in Nazi Germany was singled out, Jews around the world were intimidated by that act." 135 Cong. Rec. H.3185 (1989) (statement of Rep. Studds).

In addressing these harms, the government has an interest far greater than merely avoiding "controversial issues," Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) or protecting "dignity". Boos v. Barry. This is not a case of "signs with political messages... classically political speech," id. at 318: the protection of offensive speech stops at the threshold of violence.

B. The State has previously articulated its compelling state interest in combatting bias-related violent conduct.

Petitioner also objected that "[w]ithout citing legal authority, the Minnesota Supreme Court stated that the burning of a cross ... was 'deplorable conduct the city of St. Paul may without question prohibit,' and that it

was the 'responsibility, even the obligation, of diverse communities to confront such notions in what ever form they appear.'" Petition for Writ at 5. Our society has long mandated that the state has the affirmative obligation to protect against threats or violence designed to interfere with civil or constitutional rights. Such protections, incorporating the duty to combat historic subjugation, are reflected in the 13th, 14th, 15th, and 19th Amendments to the U.S. Constitution; 18 U.S.C. §§ 241, 242; 42 U.S.C. 1981, 1982, 1983 (known in 1871 as the Ku Klux Klan Act), 1985(c); and 18 U.S.C. § 1091(a), (c) (Genocide Convention Implementation Act of 1987) (including as an offense the incitement to kill, injure, impair, or torture members of an ethnic, racial, national or religious group with the intent to destroy that group). Eliminating racist violence and intimidation is purportedly "national policy" in the United States. U.S. v. Price, 383 U.S. 787 (1966) (prosecutions concerning the murder of Chaney,

Scwerner, and Goodman); U.S. v. Guest, 383 U.S. 745 (1966); and Monroe v. Pape, 365 U.S. 167 (1961) (Ku Klux Klan Act of 1871 and its present forms are a means of enforcing § 5 of the fourteenth amendment, drafted specifically in response to Klan lawlesness). The Minnesota Supreme Court is not alone in finding that this social responsibility includes confronting bias-related violence. The Congress, in enacting the Hate Crime Statistics Act, recognized the destructive impact of activities such as cross-burning, anti-Semitic graffiti, and bias-related destruction and violence when it authorized the U.S. Justice Department to compile statistics on bias-related criminal conduct based on race, religion, sexual orientation or ethnicity.[7] The Congress responded to "disturbing signs that the number of hate

---

[7] Although conduct directed at lesbians and gay men is not included in § 292.02, homophobic violence is extensive, severe, increasing, and systematically linked to the reign of terror against people of color. Racially Motivated Violence Hearings 59 (statement of Ms. Davis-McCoy) (members of the White Patriot Party shot five apparently men, perceived to be gay, in North Carolina).

crimes has skyrocketed in this country. ... (T)he New York City Police Department reported that hate crimes doubled in the last 2 years." 135 Cong. Rec. H3179 (1989) (statement of Rep. Schumer, supporting the Hate Crime Statistics Act). Cleveland, for example, has experienced an increase in racist violence of 200%, Racially Motivated Violence Hearings 14 (statement of Rev. C.T. Vivian). Organized white supremacist groups increasingly participate in paramilitary training and obtain explosives, mines, antitank weapons, and semiautomatic rifles. Racially Motivated Violence Hearings 58 (Statement of Christina Davis-McCoy, Field Organizer, North Carolinians Against Racist and Religious Violence). In January of this year, members of a racist, far-right group were indicted for theft of explosives and arms from the military. The Southern Poverty Law Center, 54 Klanwatch Intelligence Report 1, 6 (Feb. 1991).

The magnitude of the problem cannot be

overstated. "The National Institute Against Prejudice and Violence, based in Maryland, conservatively estimates that 1 out of every 5 minority persons experiences some form of victimization based on prejudice every year." 135 Cong. Rec. H3185 (1989) (statement of Rep. Cardin). "[A] Los Angeles County Human Relations Commission report showed that Asians were victims of 24 percent of the hate crimes committed in 1986, up 14 percent from 1985. There is also evidence of growing Klan, neo-Nazi, Skinhead and other hate group activity throughout the Nation." 135 Cong. Rec. H3182 (1989) (statement of Rep. Green).

Embodied in the very need for Congress to pass legislation that distinguishes "hate crime" violence from other violence is a recognition that "arson based on racism is quite different than arson for any other reason." Racially Motivated Violence Hearings 16 (statement of Rev, Vivian). "The death of Michael Griffith in the Howard Beach neighborhood of Queens

is not just a hit and run, a cross-burning on a front lawn is more than arson," according to Representative Kennelly from Connecticut, the original author of the bill. "Hate crimes motivated by political, religious or social intolerance need to be distinguished from other crimes." 135 Cong. Rec. H3182 (1989) (statement of Rep. Kennelly).

The responsibility and obligation to grapple with this violence and terror has been eloquently stated: "due to discrimination by some, certain individuals enjoy lesser freedoms, [and] it is our responsibility to restore equity." 135 Cong. Rec. H3188 (1989) (statement of Rep. Brennan). In the fact of racist terror and violence, "we need to send a resounding message to the people of this country that we are not going to put up with these hate crimes any longer." 136 Cong. Rec S1073 (1990) (statement of Sen. Hatch). The state must act, within permissible boundaries, because "segments of our society have been the victims of the heinous acts of

cowardly thugs who strike only when they sense a climate of dominance." 135 Cong. Rec. H3180 (1989) (statement of Rep. James).[8]

These compelling state interests in restricting conduct such as that of R.A.V must be balanced against the state interest in allowing absolute freedom of expression if the Court finds that this statute infringes protected speech. Cross burning on the property of a Black family in a mostly white neighborhood in the dead of night does not provide "the time to expose through discussion the falsehood and fallacies" of speech. Whitney v. California, 274 U.S. 357, 377 (1927)

---

[8] The state has, in the past, contributed to the climate of dominance: by "not acting sufficiently to protect the rights of these groups," Racially Motivated Violence Hearings 12 (statement of Rep. Conyers, Chair); Id. at 108 (statement of Douglas Seymour, Special Assistant, Center for Democratic Renewal) (by failing to carry out prosecutions, and by police destroying records of white supremacist organizations); Id. at 54 (statement of Rev. Benjamin Hooks) (by assaulting affirmative action and women's rights); Increasing Violence Against Minorities 41-42 (prepared statement of Arthur Kinoy, Center for Constitutional Rights citing information from the Rowe Task Force Report) and Ridgeway at 72-4 (by being complicit in violence against Blacks).

(holding overruled in Brandenberg, but generally, Brandeis advising that in most cases, the "remedy to be applied is more speech.") Conduct reachable under § 292.02 is that in which the "incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." Id. at 377. For the five elderly Black women of Chattanooga shot by Klan members who mobilized for their ride of terror and violence by burning a cross at a prominent location, there was no opportunity for 'full discussion.' Complaint at 5-8, Crumsey v. The Justice Knights of the Ku Klux Klan, No. CIV-1-80-287 (E.D. Tenn. Mar. 1, 1982). If the "right conclusions are more likely to be gathered out of a multitude of tongues," New York Times v. Sullivan, 376 U.S. 254 (1964) (citation omitted), we must realize that centuries of violence, if allowed to continue, inhibit the participation of some certain tongues.

Where the "best test of truth is the power of the

thought to get itself accepted in the competition of the market," Abrahms v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), such dialogue is not facilitated by conduct that silences. For the 3,500 people lynched from 1866-1875, Scott-McLaughlin at 5, racist violence did not serve to enlighten nor to stimulate greater discourse, bringing society closer to the truth. An imminent threat of violence, borne out by centuries of vicious brutality, is not designed nor does it serve to invigorate public dialogue or "produce a more capable citizenry and more perfect polity." Cohen v. California, 403 U.S. 15, 24 (1971). An infiltrator of the Klan for the San Diego Police Department explained that "If they needed to terrorize and intimidate people through burning crosses and other such activities, they would do that." Racially Motivated Violence Hearing 107-08 (statement of Douglas Seymour, Special Assistant, Center for Democratic Renewal). Neither the purpose nor the effect of cross burning is to engage in lively debate: it

is and has been to terrorize, to intimidate and to spark violence, even murder. The effect of the conduct proscribed by § 292.02, "tantamount to intimidation by threat of physical violence," Lee at 956, chills the expression of its targeted victims, as well as infringes their right to live, work, go to school, vote, make contracts and raise families with equal freedom as other citizens. We cannot "assure unfettered interchange of ideas for the bringing about of political and social changes." Roth v. U.S., 354 U.S. 476 (1957) if we protect the purveyors of racist violence but not the victims.

C. The ordinance, as judicially construed, is a narrowly tailored means to serve the state interest

§ 292.02 is narrowly tailored to serve the state's compelling interest in forestalling the extensive harms of bias-related violence. It proscribes only biased conduct that crosses the threshold into a directed, imminent, likely, concrete, incitement to lawless action, Brandenberg and its progeny; or when extremely personally offensive fighting words inflict injury or tend to incite an immediate breach of the peace in a manner that is directed to an individual, face to face, Chaplinsky, Norwell v. City of Cincinnati, 414 U.S. 14 (1973), Gooding v. Wilson, Lewis v. New Orleans, 408 U.S. 518 (1972). The proscription of such biased conduct is "intimately related" to substantial government interests in public safty and equal protection, as required by Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980). In Schaumburg, the state interest was only peripherally

promoted," and there was only an indirect relationship between the restriction on expression and the interest of the state. Id. at 636. In the case at bar, however, the restrictions are not an "imprecise tool" to achieve the legislative purposes. Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984). The link between terroristic acts like midnight cross burnings and violence is irrefutable and examples abound. See e.g., Center for Democratic Renewal, Weekly Update (June 5, 1989, Sept. 11, 1989, Oct. 23, 1989) (cross burnings accompanying a shooting, vandalism, torching a house, and rock throwing). With precise, direct promotion of the state interest, § 292.02 is appropriately narrowly tailored.

III. § 292.02 SERVES A COMPELLING STATE INTEREST IN ADDRESSING SEXIST VIOLENCE

Under St. Paul City Ordinance 292.02, gender is one of the grounds upon which disorderly conduct can

be established. Petitioner blithely dismisses this as evidence that § 292.02 is "subject to the changing political climate ... and the consensus of the majority." Brief for Petitioner at 19. The need for legislation, however, addressing violence and disorderly conduct on the basis of gender has long been evident: every 18 seconds, a woman is beaten, and every three and a half minutes, a women is a victim of a rape or an attempted rape. Women, Violence and the Law: Hearing Before the House Select Committee on Children, Youth and Families, 100th Cong., 1st Sess. 1 (1987) (hereinafter "Women, Violence and the Law Hearing) (statement of Rep. Miller, Chair).[9] Violence against women as gender-related biased crimes takes many forms: marital rape is one of the most egregious forms of violence, and it is still not treated as a crime

[9] See also Centre for Social Development and Human Affairs, United Nations, Violence Against Women in the Family 4 (1989) (official international concern about violence against women).

in over half the states of this country. Women, Violence and the Law Hearing at 29 (statement of Elizabeth Holtzman, District Attorney, Kings County, NY). Domestic violence is another gender-based crime perpetrated against women; the FBI estimates that a woman is beaten every 18 seconds in domestic violence in the United States, and as many as 6 million women are battered every year. Id.

The long-term results of such assault is devastating: a New York City study found that half of the women who attempt or commit suicide are battered women. Id. Survivors of sexual crimes of violence may sustain physical damage, and commonly suffer severe emotional and psychological injury. J. & H Schwendiger, Rape and Inequality 31 (1983). Additionally, the harm of gender-based violence falls disproportionately on Black women, C. Wolf Harlow, U.S. Dept. of Justice, Female Victims of Violent Crime (Jan. 1991); Williams, Violence Against Women, 12 The

Black Scholar 18 (1981) and lesbians of Color, G. Comstock, Violence Against Lesbians and Gay Men 37, 38 (1991).

It is incumbent upon society to respond specifically to the problem of gender-based threats and attacks because "[v]iolence against women is the most visible and the most odious form of discrimination against women, and it is largely a symptom of the broader refusal of society we live in to recognize the humanity and dignity of women that derives from a recognition of their equality." Women, Violence and the Law Hearing at 32 (statement of Elizabeth Holtzman). § 292.02 is a narrowly tailored means of serving the compelling state interest in opposing violence against plaintiff.

IV. THIS COURT SHOULD NOT FORECLOSE THE USE OF "HATE CRIME" LEGISLATION TO OPPOSE RISING HOMOPHOBIC VIOLENCE

The scope of the harms inflicted by bias-related

violence extend beyond those foresen in § 292.02: lesbians anbd gay men are subject to horrendous violence. With Petitioner declaring that "[t]his case provides a logical and appropriate setting for this Court to ... clarify the standards for deciding the constitutionality of 'hate crime' legislation," Petition for Writ at 13, it is essential to briefly examine the state's compelling interest in regulating homophobic violence. This interest is evident in the fact that sexual orientation was incorporated into the Hate Crime Statistics Act § 1(b)(1), and homophobic violence has been specifically restricted by 15 states, 11 municipalities, and the District of Columbia. The summary of the "Hate Crimes" bill that the Senate passed in February 8, 1990, noted that, from 1985-1986, the number of sexually oriented bias crimes had more than doubled." 136 Cong. Rec. S1069 (1990) (Sen.

briefing paper).[10] Studies reveal that slightly more than half of socially active Lesbians and gay men experience some type of anti-Lesbian or -gay violence. G. Comstock, Violence Against Lesbians and Gay Men 37 (1991). Lesbian and Gay individuals were four times more likely to be victims of violent crime than people in the general urban population. Antigay Violence: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 99th Cong., 2nd Session 3 (1986) (hereinafter "Antigay Violence Hearings) (statement of Kevin Berrill, Director, Violence Project, National Gay and Lesbian Task Force; G. Comstock, Violence Against Lesbians and Gay Men 55 (1991)).

A full 35% of the incidents of violence involve

---

[10] See also Antigay Violence Hearings 6 (statement Diana Christensen, citing records showing a 50% increase in incidents of antigay violence from 1984-85); Id. 9 (statement of David Wertheimer, Executive Director of the New York City Gay and Lesbian Anti-Violence Task Force, noting 41% increase 1984-85 and 91% increase 1985-86 in caseload for direct services).

the use of weapons, and 35% of all survivors require medical attention, Antigay Violence Hearings 3 (statement of Diana Christensen, Executive Director of Community United Against Violence), and up to 16% of respondents report being raped because of their sexual orientation. Comstock at 40. As a pattern, the American Psychological Association noted that homophobic attacks "tend to be more violent than other physical assaults." Antigay Violence Hearing 12 (1986)(statement of Dr. Gregory Herek, American Psychological Association). Health care workers have reported that attacks against Lesbians and gay men "were the most heinous and brutal I encountered. ... They frequently involved torture, cutting, mutilation, and beating, and showed the absolute intent to rub out the human being because of his [sexual] orientation." Comstock at 46.

A survivor of homophobic violence must not only recover from physical and psychological harm, but also

risks being fired, evicted, or denied services if their sexual orientation becomes public. Antigay Violence Hearings 13 (statement of Dr. Gregory Herek).[11] States must not be precluded from using narrowly tailored means to serve the compelling state interest in stemming the tide of violence against lesbians and gay men, just as they must be able to work to eradicate threats and violence on the basis of race and gender.

---

[11] With Bowers v. Hardwick allowing states to criminalize intimate relations of Lesbians and gay men, there is "effectively create[d] a cultural climate in which individual expressions of homophobia, including violence, are tolerated or even encouraged." Antigay Violence Hearing 13 (statement of Dr. Gregory Herek).

CONCLUSION

In the face of imminent threats of violence -- threats that are entirely credible in light of the reality and the history of rampant racist and sexist brutality -- the state should be able to protect the lives, safety, and well-being of the individuals under attack. Petitioner's efforts to obscure this fact by invoking notions of "reverse intolerance" and "intellectual intimidation" must be dismissed as irrelevant, and incorrect. Petition for Writ at 8. § 292.02, preventing only the most egregious acts of biased violence, cannot be said to "legislate social intolerance" unless criminal statutes can be said to be similarly 'intolerant' of violence, assault, and murder.

From the vantage point of those lynched and raped, these laws may increase the likelihood of living without arson; assault; having to move; or having a church, home, temple or judge's chambers bombed. Petitioner claims that what the state intends to illegitimately increase is "understanding." If 'increased

understanding' on the part of members of dominant groups is a byproduct of the reduction of bias-related violence, it is not to be avoided, but the thrust of such laws is to protect the victims from real harms, not to enlighten the perpetrators.

Petitioner attempts to belittle the necessity of protecting historically oppressed groups and individuals from continuing threats and violence by equating that necessity with the desire to "avoid having one's feelings hurt." Petition for Writ at 8. Not all disruptive or controversial speech, however, is steeped in centuries-long tradition of violent attacks. Blacks, Latinas and Latinos, Native Americans, Asian Americans, Jews and lesbians and gay men are among the groups which have historically been subject to violent attack. It is a manifest distortion of reality to claim there is an undifferentiated slippery slope leading from the midnight cross burning trespasser, to the speaker on communism or lesbian rights who offends and angers

those who oppose those views. Only the former acts, within a contextual history of violent attack, to subject a group of people to terror and utilizes a symbol which has been the prelude to widespread and severe violence.

The links between these specific acts which trigger, signal, or accompany violence have proven to be direct and intimate. The Klan, for instance, responsible for innumerable killings shootings, beating, stabbings, house bombings, church and temple bombings, and acts of arson,[12] "intimidates its intended victims by terroristic signs and symbols, especially cross burnings." T. Clark, The South Since Reconstruction, 505 (1973). The violence and the terrorization may have changed forms somewhat since slavery, and since 1871, when 297 Black people were lynched in one month in New Orleans, Scott-McLaughlin at 5, but racist

[12] Chalmers at 349-65, citing report published by the Friends' Service Commitee, National Council of Churches of Christ, and the Southern Regional Council in 1959.

intimidation or "disorderly conduct" under § 292.02 is set in a historical context where the threat and the culmination of violence are very real. As recently as August 30, 1991, a young man of color was found hanging from a tree with his hands tied behind his back. Seattle Times, July 31, 1991, at 1,8.

For those people of color, women, lesbians and gay men not actually killed by bias-motivated violence, the costs are still severe. Members of targeted groups are "denied personal security and liberty," Matsuda at 2321, and retain only second-class citizenship in a country failing to live up to its promise of equal protection. With the government condoning, or at the least, remaining indifferent to bias-related violence, it is perpetuated institutionally: "gutter racism, parlor racism, corporate racism, government racism ... work in coordination, reinforcing existing conditions of domination. Id. at 2335.

Race, gender, class, sexual orientation, religion,

and other characteristics determine how much access one will have to the marketplace of ideas, and whether, for example, one will be lynched for one's expression, as was fourteen year old Emmet Till.[13] The mere fact that the government does not interfere with the 'liberty' to speak does translate to a right of freedom of expression for people of color and women who "are the objects of a constitutional omission which has been incorporated into a theory of neutrality." Williams, "The Obliging Shell," 87 Mich. L. Rev. 2128, 2142 (1989). In the experience of another Black woman, "speech has never been free, and racism has always been quite costly." Ransby, "Racism and Free Speech," The Agenda (June 1989) (Ann Arbor, MI). [14]

---

[13] Emmet Till was a young Black man, kidnapped and murdered by two white men for allegedly whistling at a white woman. An all white male jury acquitted the two men, even though they admitted to kidnapping Till. T. Clark, The South Since Reconstruction 425 (1973).

[14] While Petitioner claims that it is the assertion of rights and identity that causes "'balkanization' among groups," Brief for Petitioner at 19 n.11, it is in fact practices of subordination

There is a need for policies against bias-motivated threats not because such speech is rude and insensitive, but because there is a deep and pervasive problem of institutional racism and sexism which impacts, often violently, on the targeted groups and individuals. Bias-related violence is but one form of subordination of powerless groups: subordination that denies people access to the systems that control their lives and constrains their ability to obtain adequate food, shelter, education, health care, employment; subordination that prevents people from living in intimate relationships, having healthy families, and developing an empowered community. The strands of physical violence, economic violence, emotional violence are among those woven

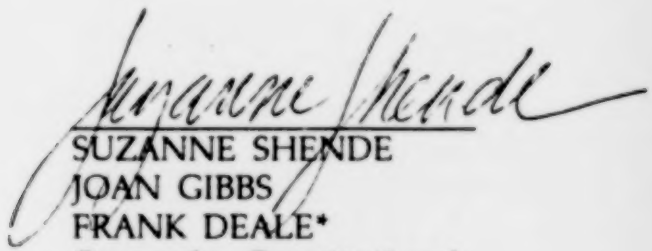
---

like "odious hate crime [that] pits nationalities, races, and religions against one another, thereby tearing at the fabric of a nation that can survive only when its citizens harmonize their differences." 135 Cong. Rec. H3180 (1989) (statement of Rep. Gekas). In a pluralistic society, we cannot overcome inequality by denying real differences in power, culture, history, and identity, nor by forcing the least empowered to bear the burdens of an "act of tolerance." Brief for Petitioner at 35 n. 31.

into the tight-knit web of domination and exclusion. Proscribing bias-related violence is only a step, but it is a necessary step towards the elimination of inequality.

Accordingly, and for the reasons set forth above, this Court should affirm the judgment of the Minnesota Supreme Court and find § 292.02, as judicially narrowed and as applied, constitutional.

Respectfully submitted,



SUZANNE SHENDE
JOAN GIBBS
FRANK DEALE*
Center for Constitutional Rights
666 Broadway, 7th Fl.
New York, NY 10012
(212) 614-6464

*Counsel of Record

Counsel would like to express their appreciation for the assistance provided by Anthony Van Jones, B. Mullings and Nelson Thayer in preparation of this brief.

APPENDIX

INDEX TO APPENDIX

Statements of Interest	Page
Center for Constitutional Rights	A1
Center for Democratic Renewal	A2
Greater Boston Civil Rights Coalition	A3
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America	A6
National Coalition for Black Lesbians and Gays	A7
National Conference of Black Lawyers	A9
National Council of La Raza	A10
National Institute Against Prejudice and Violence	A12
National Lawyers Guild	A13
National Organization of Black Law Enforcement Executives	A15
United Church of Christ Commission for Racial Justice	A17
Young Women's Christian Association of America	A19

STATEMENTS OF INTEREST

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was created in 1966 by lawyers who were active in the civil rights movement and the struggle of women and ethnic minorities in the United States for true equality. CCR attorneys have been involved in cases concerning voting rights, community control of schools, fair housing, employment discrimination, jury composition, and international human rights. Through litigation and public education CCR has worked to make meaningful the constitutional statutory, and international rights of women, Blacks, Puerto Ricans, Native Americans, Asians, and Chicanos.

The Center for Constitutional Rights joins with amici to urge the Court to uphold this ordinance, which represents the attempts of local governments nationwide to combat the escalating violence against People of Color, women, and other historically oppressed groups. Failing to uphold this statute, which threatens no constitutionally

protected expression, will send the dangerous message that this society, at its highest levels, will continue to tolerate vicious brutality directed against people because of their race, ethnicity, gender, sexual orientation and religion.

* * *

The CENTER FOR DEMOCRATIC RENEWAL (CDR) is a national, non-profit, tax-exempt clearinghouse for information on constructive, non-violent responses to hate group activity and bigoted violence. Founded in 1979 as the National Anti-Klan Network, today the CDR conducts programs of research, leadership training, community organizing, public education and litigation.

With offices in Atlanta, Georgia, Kansas City, Missouri, and Seattle, Washington, the CDR also aids the victims of bigoted violence through telephone counseling and emergency assistance. The CDR serves a diverse constituency of more than 10,000 members and supporters throughout the United States.

The CDR believes that municipal, state and federal legislation addressing the problem of hate crimes can both deter acts of bigoted violence and send a strong signal that such acts are not sanctioned by the community. The CDR wishes to join as an amicus curiae in this case in order to lend the perspective of a national, multi-racial, interfaith organization dedicated to preserving and enhancing the rights of all persons victimized by bigotry and intolerance. The CDR is of the belief that the constitutionality of the St. Paul, Minnesota, ordinance in question should be upheld.

* * *

The GREATER BOSTON CIVIL RIGHTS COALITION (GBCRC) was founded in 1979 to address increases in racial, religious and ethnic violence within the Greater Boston area. The coalition was founded during the height of the busing and desegregation controversy that racked the city of Boston. Today, the GBCRC is a coalition of over 100 private and public civil rights, law

enforcement, religious, community and grass roots organizations who meet together regularly to discuss issues of discrimination based on race, religion and ethnic origin. Among the priorities of the BGCRC, four have remained paramount over the past decade of the GBCRC's work:

*Advancing the progress of civil rights by fostering harmonious racial, religious and ethnic relations.

*Improving communication among participating organizations.

*Training of law enforcement personnel in dealing with hate crime and violations of civil rights.

*Focusing on shaping public and private policy as it relates to discrimination in the political, economic and social realms.

*Advocating for the effective use of civil rights laws to deter hate crimes.

The GBCRC took the most prominent role of any organization in gaining the enactment of the

Massachusetts Hate Crime Reporting Act, signed into law in December of 1990. That Act mandates the collection of hate crime data for the first time in the history of the Commonwealth; in direct response to the work of the Coalition, Governor William Weld recently appointed a Hate Crime Reporting Implementation Task Force, on which the GBCRC has several seats.

The Coalition members support legislation to recognize the severity of hate crime and its resounding impact on effected communities. The Coalition strongly believes that hate crime perpetrators should be punished for their acts, and that such punishment sends a message to both the victimized community and its victimizers: that acts of terror and hate based on the race, religion or ethnic background of an individual or a community will be punished. We firmly support the right of communities to enact legislation which consistent with first amendment protection prohibits unlawful hate crime. We firmly support the application of the St. Paul ordinance to

combat the hate crime in the instant case.

* * *

The INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), is a labor organization with approximately one million members headquartered in Detroit, Michigan. The UAW is an industrial union representing private and public employees throughout the United States.

Since its inception in the 1930s, the UAW has been an instrumental part of the Civil Rights movement in the United States. In the 1940s, the UAW established a Fair Practices Committee to monitor and improve the treatment of workers in the plants and to strive for broader racial justice in society. In the 1950s and 1960s, the UAW worked with its allies for desegregation, voting rights, equal employment opportunity, and fair housing. In the 1970s, the union won contractual non-discrimination protection in its collective bargaining agreements and the

establishment of Civil Rights Committees in its local unions. In both the 1970s and 1980s, the UAW supported the adoption of improved federal, state, and local legislation protecting minorities, women, and others subjected to the discrimination and bigotry still all too prevalent in our society.

Despite the progress made in the last sixty years toward racial justice in this county, there remains a strong undercurrent of virulent racism and sexism which too often manifests itself in hate crimes, violence, threats, and intimidation. In response, many states and localities have enacted legislation intended to protect citizens from the tangible harm which results from being subjected to these actions. In order to support these state and local initiatives, the UAW joins in this amicus brief.

* * *

The NATIONAL COALITION FOR BLACK LESBIANS AND GAYS (NCBLG) is the oldest Black organization in the country working to advocate and

promote the empowerment and enhancement of the lesbian and gay community. Formally a chapter organization with branches in Baltimore, Chicago, Detroit, New York and Oakland/San Francisco, the national office is located in Washington D.C. We have over 500 members nationally and our numbers are on the increase.

NCBLG is presently working and addressing legislative policy and educational concerns that constantly confront the diverse communities of the country. NCBLG finds that there is a need in the community for workshops, seminars, and lectures to provide training on these issues, as well as other initiatives such as our Project Dialogue, HIV/AIDS information and the Leadership Development series.

Since NCBLG began in 1979, it has been dedicated to equal rights and civil liberties for the entire community regardless of race, gender, or sexual orientation. In spite of the strides that have been accomplished in the last 50 years, injustice continues to be prevalent. This is evident

by the increase of hate crimes throughout the country. NCBLG wishes to join other progressive organizations which work to protect all citizens from the physical and psychological harm which may be a by-product of these bias-related crimes.

* * *

The NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is a non-profit organization founded in 1968, and comprised of over 2500 lawyers, law students, legal workers and other individuals working for social justice. NCBL and its members engage in affirmative litigation and activities to challenge and correct acts of injustice based on race, sex, religion and other irrational biases. Cross burning is without question such an act. We agree with the Minnesota Supreme Court's characterization of cross burning as a symbol of violence and hatred based on notions of racial supremacy. Because cross burning represents the kind of abominable "speech" that we are working to eliminate, NCBL joins

the other amici in urging this Court to uphold the Minnesota statute as constitutional.

* * *

The NATIONAL COUNCIL OF LA RAZA (NCLR), the largest constituency-based national Hispanic organization, exists to improve life opportunities for the more than 22 million Americans of Hispanic descent. NCLR acts as an umbrella organization for its 139 affiliated Hispanic community-based organizations, which together serve 35 states, the District of Columbia, and Puerto Rico and reach more than one million Hispanics annually. NCLR has four missions: applied research, policy analysis and advocacy on behalf of the entire Hispanic community; capacity-building assistance to support and strengthen Hispanic community-based organizations; public information activities designed to provide accurate information and positive images of Hispanics; and special innovative, catalytic, and international projects. In addition to its Washington, D.C.

national headquarters, NCLR maintains field offices in Los Angeles, California; Phoenix, Arizona; McAllen, Texas; and Chicago, Illinois.

NCLR has long recognized that Hispanics are frequently the victims of hate crimes and the targets of violent threats and intimidating behavior (i.e., "fighting words") because of prejudice toward national origin characteristics such as physical appearance, language or speech accent, and cultural characteristics. NCLR is, therefore, particularly interested in the St. Paul crossburning statute case, R.A.V. v. City of St. Paul, because of its important implications for the maintenance of constitutional protection from such dangerous behavior. NCLR would like to join this amicus brief to show its support for the position that the prohibition of intimidating and harassing conduct in the subject case is constitutionally permissible.

* * *

The NATIONAL INSTITUTE AGAINST PREJUDICE AND VIOLENCE (NIAPV) is the only national center dedicated exclusively to the study of and response to violence motivated by prejudice - "ethnoviolence". Founded in 1984, NIAPV is a not-for-profit tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. NIAPV conducts research on the causes of ethnoviolence and its effect on victims and communities; serves as a clearinghouse of information; and provides education and consultation including human relations training, legal and policy analysis, and assistance to agencies and organizations.

NIAPV has conducted pioneering research on the prevalence and impact of ethnoviolent victimization on college campuses, in the workplace, and in the larger community. In its National Victimization Survey, the first national study of its kind, NIAPV established that acts of violence motivated by prejudice have greater traumatic impact on victims than do other forms of victimization.

In addition, NIAPV is publisher of the most comprehensive legal manual available on criminal and civil remedies for violence motivated by prejudice.

Intergroup prejudice and violence tear at the very fabric of our society. NIAPV believes that states have a compelling interest in protecting both individual victims and the larger community through legal remedies which recognize the unique harm inflicted by acts of bigoted violence. NIAPV further believes that in tailoring criminal sanctions and civil remedies to address this unique harm, states do not thereby infringe on our precious First Amendment freedoms as they have been defined in decisions of the United States Supreme Court.

* * *

The NATIONAL LAWYERS GUILD (Guild) is a national organization representing over 10,000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters throughout the United States. Since its founding in 1937, the Guild has provided legal support to

virtually every struggle in this country for economic, social and political justice.

The rise of hate and bias related acts in the form of speech and conduct in the past several years presents this society with the challenge to reconcile civil liberties principles of equal protection and free expression. The Guild opposes bias, bigotry, and discrimination on the basis of race, gender, sexual orientation and religion. When acts of hate, viewed in their historical context of perpetuating racial supremacy, infringe upon the ability of people of color and others to enjoy equality free of racial discrimination, the actor ought to be punished by the law. Examples of such acts include cross burnings, the placement of swastikas and the intimidating wearing of the Ku Klux Klan hood.

The National Lawyers Guild joins with the other amici curiae in this important case of public concern to present its views on the legal effort to combat White supremacy.

* * *

The NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES (NOBLE) is a non-profit organization of police chiefs, agency heads, command-level law enforcement officials and criminal justice educators whose membership is numbered at approximately 2400. NOBLE's goals are to develop, implement and manage innovative ideas, concepts and programs aimed at reducing violence, crime, and the elimination of racism in the criminal justice arena. NOBLE was founded in September, 1976, during a three day symposium co-sponsored by the Police Foundation and the Law Enforcement Assistance Administration (LEAA).

Consistent with its motto, "Justice by Action," NOBLE aggressively pursues its goals by conducting substantive research, speaking out on the issues and performing a variety of outreach activities. NOBLE's success in this arena is reflected by its growth and the major role it has played, and continues to play, in shaping policy in areas of vital importance to minorities and the law enforcement community. NOBLE has effectively used

the judicial process and direct correspondence to express opinions and concerns. NOBLE has endorsed strategies that provide a holistic approach to crime and violence and proactive police-community involvement.

What has come to be known as hate violence, racial and religious violence and harassment was first researched by NOBLE in 1983. NOBLE received funding from the National Institute of Justice (NIJ) to do research on the problem and to develop model policies and procedures for law enforcement agencies.

As a result, NOBLE published a law enforcement handbook that outlines a model response to racial and religious violence which is used broadly by the law enforcement community and social service practitioners. NOBLE provided education and advocacy that resulted in the passage of federal legislation requiring the collection of data on the occurrence of hate violence incidents. With a grant from the Ford Foundation, NOBLE has drafted a training program and produced a videotape for law enforcement workers on racial violence entitled

Hate Crime: a Police Perspective aimed at training police officers in effective procedures for handling hate crimes. In addition, NOBLE has developed a training curriculum to deal with cultural clashes on college campuses. The curriculum is designed to sensitize college administrators, students and law enforcement personnel to the issue of racism.

Consequently, we are particularly interested in supporting the constitutionality of the city of St. Paul's ordinance that is the subject of this amicus brief, and we wish to join in this amicus brief.

* * *

The UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE (CRJ) is the national civil rights agency of the 1.6 million-member United Church of Christ. The Commission has long been actively in-volved in the struggles for racial justice and social equality of African Americans and other minority communities in the United States. Established in 1963 by the General Synod of the United Church of Christ in response to the assassination of Medgar Evers, the Birmingham

church bombings, and the heightened racial tension then gripping the nation, CRJ has been at the forefront of the civil rights movement as a church-based agency of a major U.S. Protestant denomination.

CRJ programs have focused on a diverse range of issues, including: African American family life, capital punishment and penal reform, voter registration, racially motivated violence, child abuse, displaced homemakers,battered wives, teenage pregnancy, welfare hotels and homelessness, persons with disabilities, computer literacy, environ-mental racism, the empowerment of African American, Hispanic American, Asian Pacific American and Native American communities, and increasing the percentage of minority students in colleges through its scholarship program.

For 29 years the Commission for Racial Justice has fought racial bigotry in all of its expressions. We deplore acts of racist violence and see this case as a major opportunity for the court to affirm local governments in their efforts to thwart bias-related violence. Incidents of racist violence are occurring daily across this country. Equal rights and human rights must be extended

to all, and not diminished by racist, violent acts of others.

* * *

The YOUNG WOMENT'S CHRISTIAN ASSOCIATION OF THE U.S.A. (YWCA) is a national membership organization serving 2 million women and their families dedicated to the empowerment of women and the elimination of racism. Since 1858, the YWCA of the U.S.A. has addressed the critical connection between providing services for women, girls, and their families and acting to correct societal conditions that create the need for those services. Our members represent varied economic, social, racial, ethnic, and religious groups committed to the struggle for justice and equity and peace.

The YWCA's One Imperative, "To thrust our collective power toward the elimination of racism wherever it exists and by any means necessary," stems from our commitment to this struggle. In both our programmatic and our advocacy work we are particularly concerned with the growing numbers of racially motivated acts of violence and targeted expressions of hatred.

We believe that properly drafted statutes may be a

significant deterrent to expressions of bias engendered hatred and bigoted violence. When one individual of an historically oppressed group becomes victim to a crime based on her or his membership in that group, all members of the group experience fear and intimidation. The YWCA of the U.S.A. wishes to join as amicus curiae in this case to contribute our unique perspective of a multi-ethnic, interfaith women's membership movement with the imperative to eliminate racism. We are of the opinion that the constitutionality of the St. Paul, Minnesota, ordinance in question should be upheld.